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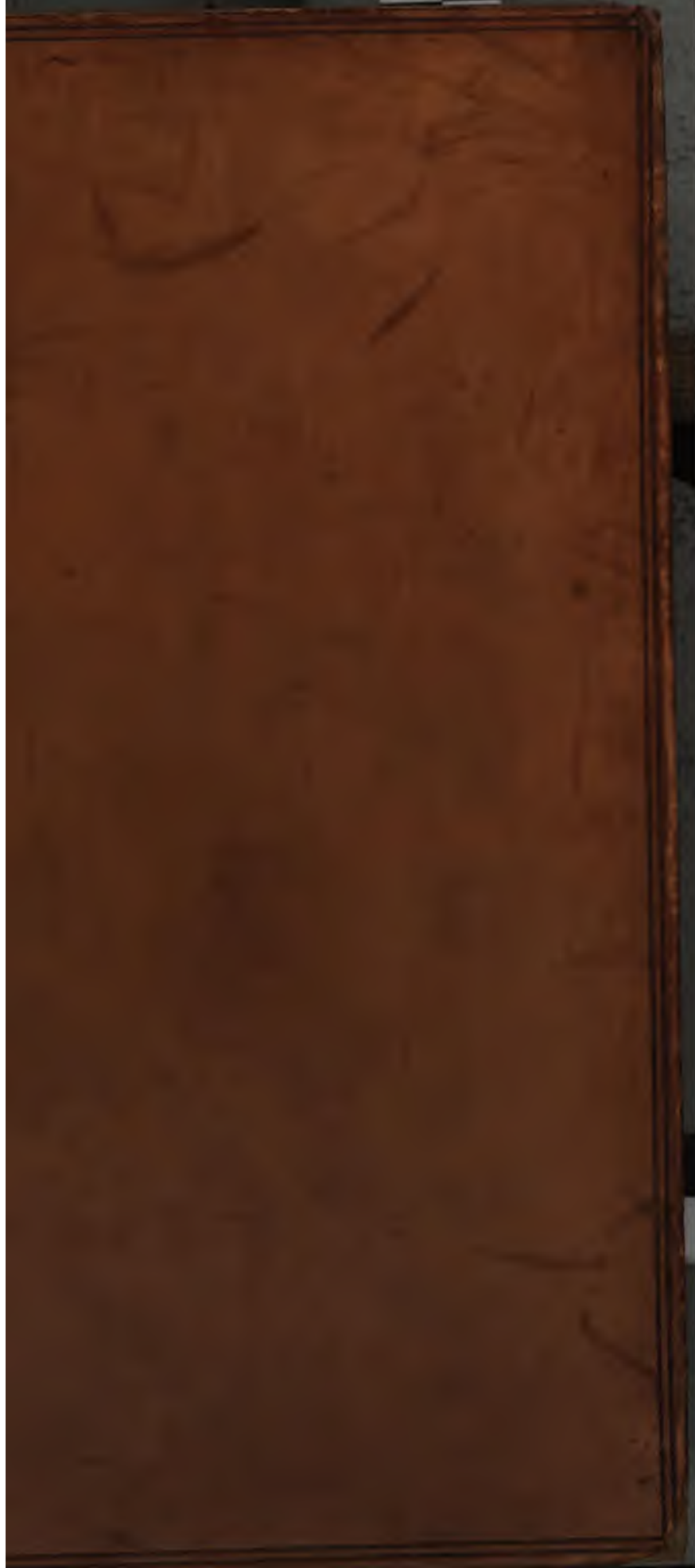
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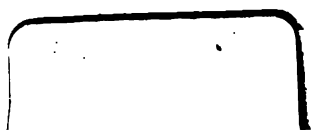
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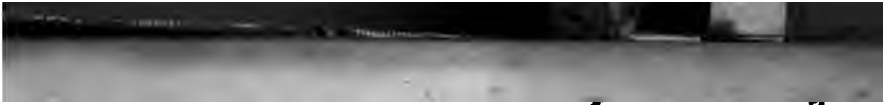


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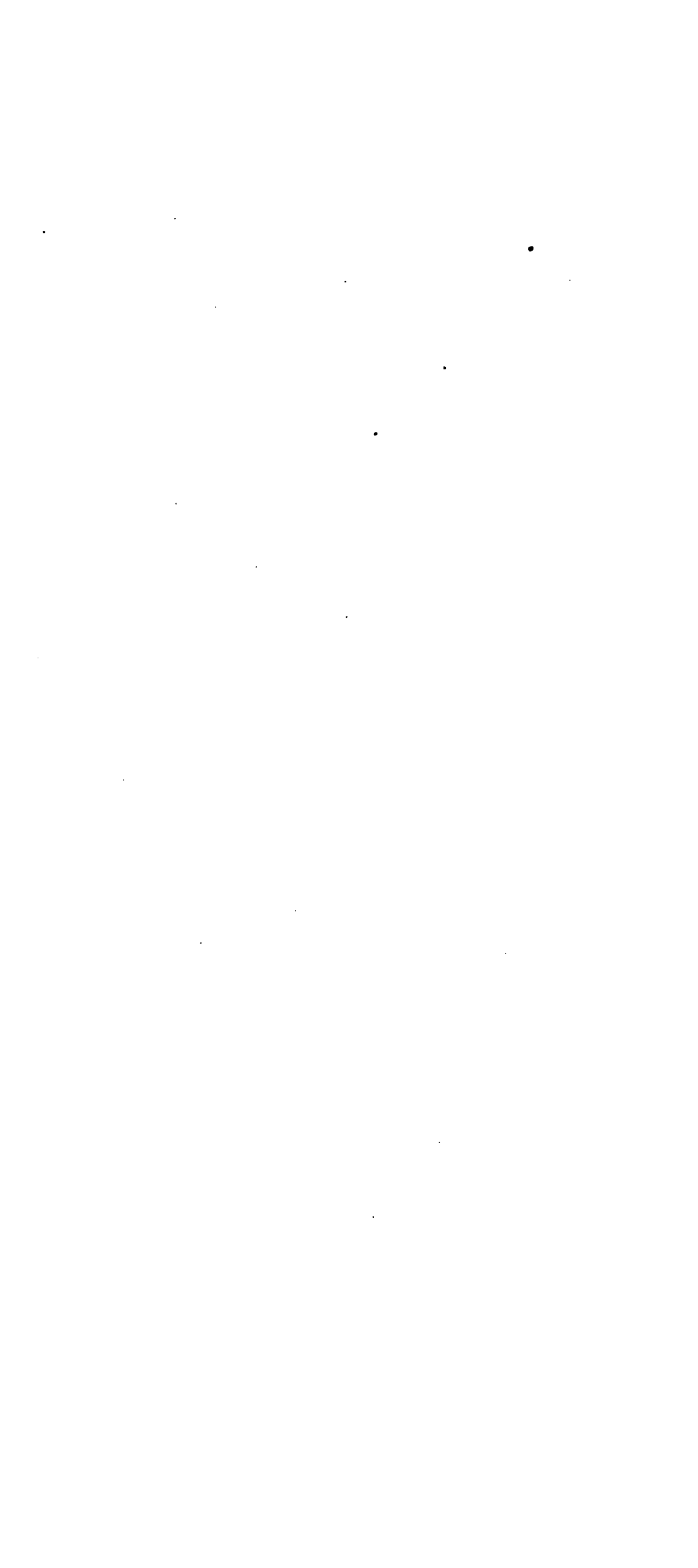
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER
IN IRELAND,

FROM
HILARY TERM, 1841, TO TRINITY TERM, 1842,
INCLUSIVE,

FOURTH AND FIFTH VICTORIA.



BY
ROBERT LONGFIELD, ESQ.
AND
JOHN FITZHENRY TOWNSEND, ESQ.
BARRISTERS AT LAW.

DUBLIN:
ANDREW MILLIKEN,
BOOKSELLER TO THE HONORABLE SOCIETY OF KING'S INNS.
104, GRAFTON-STREET.
1843.

DUBLIN :
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OPPOSITE TRINITY-STREET.

BARONS OF THE EXCHEQUER

DURING

THE PERIOD OF THESE REPORTS.

The Right Hon. MAZIERE BRADY, *Lord Chief Baron.*

The Hon. RICHARD PENNEFATHER.

The Hon. JOHN LESLIE FOSTER.

The Right Hon. JOHN RICHARDS.

In Michaelmas Vacation, 1841, Baron *Foster* became one of the Justices of the Common Pleas, and was succeeded in the Exchequer by

The Right Hon. THOMAS LEFROY.

LAW OFFICERS.

The Right Hon. D. R. PIGOTT, *Attorney-General.*

RICHARD MOORE, Esq. *Solicitor-General.*

The Right Hon. FRANCIS BLACKBURNE, *Attorney-General.*

JOSEPH DEVONSHER JACKSON, Esq. *Solicitor-General.*

A

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER

IN IRELAND,

IN HILARY TERM, IN THE FOURTH YEAR OF QUEEN VICTORIA,
AND THE SITTINGS AFTER.

O'CALLAGHAN v. SULLIVAN.

1841.

EXCHEQUER
OF PLEAS.

Assumpsit on a bill of exchange; venue, county of the city of *Dublin*; plea, the general issue.

Mond. Jan. 11.

O'CALLAGHAN

v.

SULLIVAN.

Brereton moved on the part of the defendant, that the venue in this action might be changed from the county of the city of *Dublin* to the county of *Cork*. The defendant's affidavit stated, as grounds for this application, that the cause of action arose within the county of *Cork* and not elsewhere; that the defendant's witnesses were the officers of the Branch Provincial Bank of Ireland in *Kanturk*; that they all resided at *Kanturk* in the county of *Cork*; that it would be attended with great expense and inconvenience to bring them to *Dublin*; and that the defendant had a *bonâ fide* defence.

In an action on a bill of exchange, the court, though it will not change the venue on the ordinary affidavit, will do so on special grounds. The proper time to apply, is after plea pleaded.

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O'CALLAG-
HAN
v.
SULLIVAN.

Although the venue will not be changed, in an action on a bill of exchange, on the usual affidavit, yet it will be changed on special grounds. Here sufficient grounds are shown to the court; and the application is made at the proper time, being after plea pleaded and issue joined. *Bank of Ireland v. James Stewart*(a); *Cross v. Beresford* (b).

Lysaght contra. The Court will not change the venue in an action on a bill of exchange.

Order absolute.

(a) 2 L. R. N. S. 179.

(b) 1 Cr. & Dix. 355.

1841.
EXCHEQUER
OF PLEAS.
Tues. Jan. 12.
HOSIER
v.
POWELL.

HOSIER v. POWELL.

COVENANT, by the plaintiff as assignee of the reversion against the defendant as assignee of the lessee. This action was brought for breach of a covenant to keep certain premises in repair, and to deliver up the same in good tenantable order at the termination of the lease. The declaration stated, that the Right Hon. *Luke Gardiner*, being seized in fee of the lands of *Constable Hills*, in the county of *Carlow*, in the year 1755, duly made and published his last will and testament in writing, and thereby devised (together with other lands) the said lands to certain trustees, to the use of his eldest son, *Charles Gardiner* for life, with remainder to *Luke Gardiner*, grandson of the testator, for life, with remainder to the first and other sons of *Luke Gardiner*, the grandson, in tail

A power to lease for three lives or thirty-one years, authorizes a lease for three lives, and thirty-one years concurrent. Although a lease under such a power operates as an appointment, it is sufficient in pleading to state it as a lease.

Where judgment has been delayed by the court itself, as by the pendency of a new trial motion, and the defendant meanwhile dies, judgment may be entered *nunc pro tunc* saving the rights of intermediate creditors.

male. That by the said will it was declared that it should be lawful for the said *Charles Gardiner* during his life, and for all and every other person and persons who, by virtue of the limitations aforesaid, should respectively become seized of an estate of freehold in the said lands, at such time as they should respectively be in the actual possession of the same, to make any lease or leases thereof, or of any part thereof, *for any term or number of years, not exceeding three lives, or thirty-one years*; so as such lease or leases should be made to commence in possession and not in reversion, and at the best rent, payable yearly, that could be got for the premises so to be let; such leases to be made without fine, and so that such lessee or lessees should not be made punishable for waste, and should, at the making of such respective lease or leases execute a counterpart or counterparts thereof. That the testator died seized of the said premises, without having altered or revoked his said will; and that thereupon his son, the said *Charles Gardiner*, became seized as of freehold for the term of his life, of the said premises. That the said *Charles Gardiner* died on the 29th November, 1769, whereupon *Luke Gardiner*, the grandson of the testator (afterwards *Luke*, Baron *Mountjoy*,) the eldest son of the said *Charles Gardiner*, became seized under the said will in his demesne as of freehold, for the term of his life, of and in the said lands, with such power of leasing as aforesaid.

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 HOSEIER
 v.
 POWELL.

That being so seized afterwards, on the 10th March, 1790, by a certain indenture then and there made between the said *Luke*, by his then style and title of *Luke*, Baron *Mountjoy*, of the one part, and Sir *Edward William Crosbie* of the other part, (the counterpart of which said indenture sealed, &c. the plaintiff now brings into Court,) the said

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HOSIER
v.
POWELL.

Luke, Baron Mountjoy, by virtue, and in pursuance of the said power, did demise, grant, set, and to farm let unto the said Sir Edward William Crosbie the said lands, under and by the name of the town and lands of Constable Hills, in the said indenture mentioned to be in the possession of the said Sir Edward William Crosbie, as particularly described in the said indenture, with the appurtenances, to hold the same unto the said Sir Edward William Crosbie, his heirs and assigns, from the 29th of September then last passed, for and during the life and lives of the said Sir Edward William Crosbie, Edward Crosbie, and Ebenezer Walters, and also for the term of 31 years, to be computed from the said day last-mentioned, whichever should last longest, at a certain rent therein and thereby reserved and made payable by the said Sir Edward William Crosbie, his heirs and assigns, to the said Lord Mountjoy, his heirs and assigns, as in the said indenture is mentioned.

That the said Sir Edward William Crosbie did thereby for himself, his heirs and assigns, covenant, promise, and agree to, and with the said *Luke, Baron Mountjoy*, his heirs and assigns, that he the said Sir Edward William Crosbie, his heirs and assigns, should, and would well and sufficiently preserve, maintain, uphold, sustain, and keep the said demised premises, and all houses, buildings, and improvements, hedges, ditches, fences, and quicksets whatsoever then made, or grown, or thereafter to be made or grown thereupon, in good and tenantable order, repair, and condition; and at the end, or other sooner determination of the said demises, should, and would, yield and deliver up the quiet and peaceable possession thereof, in like good tenantable order, and repair, condition, unto the said *Luke, Lord Mountjoy*, his heirs and assigns.

That the said Sir *Edward William Crosbie*, afterwards, to wit, &c., entered upon the said demised premises, and was seized and possessed thereof for the said term so to him granted thereof; the reversion thereof belonging to the said *Luke*, Lord *Mountjoy*, for the term of his life. That the said *Luke*, Lord *Mountjoy*, died on 5th June, 1798, whereupon *Charles John*, Viscount *Mountjoy*, his eldest son, became seized as of fee tail of the reversion of the said lands; and being so seized afterwards, to wit, on the 1st August, 1800, an act of parliament was passed, by virtue of which the said lands of *Constable Hills* (amongst others) became vested in the Right Hon. *John Beresford*, the Right Hon. *William*, Lord *Kilconnell*, and *Robert Gardiner*, Esq. their heirs and assigns, upon trust to sell the said lands, and to invest the money to be so produced for certain purposes. And it was thereby enacted, that all and every part and parts of the said lands and premises, which should not be sold for the purposes aforesaid, should be, and remain vested in the said trustees, in trust for such person or persons, and for such estate therein, as would be entitled to the same, if the said act had not been passed.

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The declaration then averred, that after the passing of the act, and before the execution of the next mentioned indenture of bargain and sale, the said trustees named in the act, did, in execution of their trust, sell certain estates vested in them for the purposes aforesaid; but that the said lands of *Constable Hills* remained unsold after the sale made of the other estates, for the purposes of the act; that by indenture made the 21st November, 1803, alleged to be since lost and destroyed, and of which profert could not be made, the trustees of the act conveyed to the said

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Charles John, Viscount *Mountjoy* and the heirs of his body issuing, the said lands of *Constable Hills*, and the reversion of and in the said towns and lands expectant on the determination of the said demise, to the said Sir *Edward William Crosbie*; that by indenture of bargain and sale, dated 22nd November, 1803, and made between the said *Charles John*, Viscount *Mountjoy* of the first part, *Luke Norman*, gentleman, of the second part, and *John Jones*, gentleman, of the third part, and inrolled in the *Court of Common Pleas* in *Dublin*, within six months then next following, to wit, on the 25th November, 1803, the said *Charles John*, Viscount *Mountjoy* did, in consideration of 10*s.* grant, bargain, sell, release, and confirm the said lands unto the said *Luke Norman*, for the purpose of making him a tenant to the præcipe; that in Michaelmas Term, 1803, a common recovery was suffered accordingly of the said lands; that by indenture, dated the 13th March, 1805, and purporting to be made between the said Viscount *Mountjoy* of the first part, the Earl of *Clancarty*, the Earl of *Beresford*, and *Robert Gardiner*, Esq. of the second part, which was sealed and delivered by the said Viscount *Mountjoy*, but not by the said Earl of *Clancarty*, Earl of *Beresford*, *Robert Gardiner*, or any of them, the said Viscount *Mountjoy*, in consideration of a certain sum of money, did grant the said lands of *Constable Hills* unto the plaintiff, to hold to the plaintiff, his heirs and assigns for ever; that afterwards, on the 25th April, 1805, the estate of the lessee came to, and vested in the defendant *Powell*, who thereupon entered, and became and continued seized and possessed thereof from thence, until the 25th June, 1834, when the said demise ended; and the declaration averred for breach, that after the said assignment, and during the continuance of the said demise, and after the

grant of the reversion thereof to the plaintiff, the defendant suffered the said demised premises to be, and continue, and the same were during that time ruinous, prostrate, and fallen down, and in great decay for want of needful and necessary maintaining, supporting, and keeping in repair; and that the defendant, at the termination of the said term, left the said premises out of repair, and in such bad order and condition; and also that the defendant, at the expiration of the said demise, did not yield and deliver up possession of the said demised lands, but, on the contrary, wrongfully kept the plaintiff out of possession of the said lands, to wit, until the 1st January, 1830.

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To this declaration, the defendant pleaded several pleas, traversing most of the plaintiff's affirmative allegations, and pleading *non est factum* to the various deeds relied on. Fourteen issues having been agreed upon by consent between the parties, and the case having been tried at the assizes for the county of Carlow before Mr. Justice *Johnston*, a verdict was given for the plaintiff for £483, subject to certain points reserved. A rule *nisi* had been obtained on a former day to enter a nonsuit, or to set aside the verdict; the *Solicitor General*, with whom were *Gilmour*, Q. C. and *W. H. Griffith*, now appeared to make absolute the conditional order.

Solicitor General.—There were several objections taken by the defendant's counsel at the trial, upon which we submit there should have been a nonsuit. 1st, There was a variance between the lease of the 10th March, 1790, as it is stated in the pleadings, and that lease as it was shown in evidence; that lease was made by a tenant for life, and could only bind the remainderman by virtue of the power contained in the

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will of *Luke Gardiner*, the testator; it could only operate as an appointment under that will, and should therefore have been pleaded as an appointment, and not otherwise. This action not being between the original parties to that deed, the plaintiff must be strictly confined to his title as stated on the record. He pleads that "in pursuance of "the said power, the said Baron *Mountjoy* did demise, set, "and to farm let to the said Sir *Edward William Crosbie*, "all that and those the said lands;" but he should have pleaded that, "by virtue of the said power he did appoint "the said lands;" the deed should have been pleaded according to its legal effect. [RICHARDS, B. The power is to lease, and he leases; to let, and he lets.] But the lease itself is void; it should have been for three lives or thirty-one years; but it is for the term of three lives and thirty-one years, whichever should last longest. The donee of the power is limited to a period that should not exceed one or other of these terms. [RICHARDS, B.—The term contemplated is a term for three lives or thirty-one years, and this alternative lease does not exceed that, as it is a term for three lives or thirty-one years, whichever should last longest.] He had no right to grant a term dependent upon the double contingency of the termination of the lives and the running out of the years. [RICHARDS, B.—The power seems to authorize this lease; would this power not authorize a lease for 999 years, if the three lives should so long last?] There could be no objection to that; but the lease is pleaded as a lease for three lives and thirty-one years; and if the plaintiff cannot show that this is a valid lease for that term, he cannot rely upon it.

2ndly. The rent is pleaded to have been made payable by *Crosbie*, his heirs and assigns to Lord *Mountjoy*, his

heirs and assigns. Now, in a lease under a power, the reservation of rent should not be to the heirs of the lessor ; the heir indeed might sue for the rent, but he should sue as reversioner, though the law would distribute the rent to him.

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3rdly. The covenant to repair is liable to a similar objection. It is not pleaded as a covenant with the remainderman, as in fact it was. The plaintiff therefore should have been defeated on this point, upon the plea of *non est factum*.

4thly. There is no evidence that the trustees under the act of parliament conveyed the lands to Lord *Mountjoy* as alleged, and there is no evidence of the deed of 21st November, 1803.

5thly. The deed making the tenant to the præcipe is wrongly pleaded. The declaration avers a bargain and sale, sealed and inrolled ; but the deed, when produced, appears to be one operating by lease and release, not by bargain and sale. This deed says, “for the purpose of barring estates, tail, &c. Lord *Mountjoy* granted, bargained, sold, aliened, released, and confirmed to *Luke Norman* in his actual possession then being, by virtue of a certain indenture of bargain and sale, bearing date, &c. and by force of the statute for transferring uses into possession.” The Court is to put upon this deed the construction intended by the parties ; the words “release and confirm” are used, as well as “bargain and sell ;” and such being the usual form of a lease and release, the Court will infer that it was intended to operate as such. To operate as a bargain and sale, it should transfer the

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 nuary 12.

possession *instantly*, which is inconsistent with the allegation of the estate then being “in his actual possession.”

BRADY, C. B.—It is a release: calling it a bargain and sale, is a mere description; it is stated, that the lessor did grant, bargain, sell, alien, release, and confirm; he states it to have the effect of a release, and it has the effect of a release.

T. B. C. Smith, Q. C. and W. Berwick, Q. C. for the plaintiff.—There is sufficient evidence, that the trustees of the act re-vested the estate in *Charles John, Lord Mountjoy*; for three years after the passing of the act, on his coming of age, he levied a fine and suffered a recovery of these lands, and in 1805 conveyed them to the plaintiff's assignor, from which time till 1835, there is evidence of payment of rent accordingly. Even if the bargain and sale were improperly pleaded, there is on the declaration a good title independently of it. The allegation respecting the bargain and sale is immaterial under the fines and recoveries act, and may be struck out of the declaration(a). A bargain and sale of a reversion is good, and is properly pleaded as such;—we have pleaded this instrument according to the terms of the deed itself, and the Court having it thus before them will give it the proper construction. As to the mode of pleading the lease under the power, which it is alleged should have been pleaded

(a) The 3 and 4 W. 4, c. 92, sect. 7, enacts, that no common recovery already suffered, or hereafter to be suffered, shall be invalid, in consequence of the neglect to inrol in due time a bargain and sale, purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale, purporting to make the tenant to the writ, had been duly inrolled.

as an appointment, we have alleged it to be made "in pursuance of this power." They say, we should have elected to take it as a lease for three lives or thirty-one years, and pleaded it according to its legal effect, as one or the other. To this we reply, that supposing Lord *Mountjoy* had not a power to make this lease for lives and years concurrent, yet we have pleaded it *in hæc verba*, and the Court will now give it a legal construction. The cases of *Commons v. Marshall*(a), and *Long v. Rankin*(b), show conclusively that the lease as pleaded and given in evidence is valid under the leasing power in *Luke Gardiner's* will. But we are not bound to plead this instrument as an appointment in an action of covenant. *Cleyburne v. Piercy*(c). The present pleadings follow those in the well-known case of *Isherwood v. Oldknow*(d). This is not an instrument deducing title, but that creating the covenant. It may be said, that we should have pleaded this deed by stating that "it is witnessed," &c., and that the omission of these words is fatal to us. They are indeed used in *Ross v. Parker*(e), but there all but the covenant was inducement, and the principle of pleading deeds does not apply. *Cleyburne v. Piercy* is a distinct authority in this case. In covenant, it is never necessary to set out more than the language of the instrument, though in other forms of action it might be different.

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Gilmour in reply.—As to the conveyance from the trustees to Lord *Mountjoy*, I admit that a re-conveyance may in some cases be presumed; but it is otherwise when legal estate is vested in trustees indefinitely, and no

(a) 2 Sugd. Pow. 82,
(c) S. & B. 412.
(e) 1 B. & C. 358.

(b) Ib. 539.
(d) 3 M. & S. 382.

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direction is given to re-convey it. *Matthews on Presumptive Evidence*(a); *Goodright* d. Sir Robert Grosvenor v. *Swymmers*(b). The trust here was for an indefinite time, and the Court cannot presume any particular time at which the trustees ought to convey the estate. In the next place the lease has not been pleaded according to its legal operation, but the rule is, that every deed should be so pleaded. There are, indeed, some exceptions, as when in a declaration a party pleads by a *testatum existet*; but if he states as a fact that a party said so and so, he makes this statement at his peril, and must state the deed according to its legal effect, and setting out the words will not do. Many objections are fatal on the plea of *non est factum*, which would not be fatal if the party prayedoyer and demurred. Here the pleading is not by a *testatum existet*, and the plea is *non est factum*. A third distinction is, when the action is between the original parties, and when between privies; in the latter case, the party objecting stands upon higher grounds than if the action were between parties. In *Commons v. Marshall*(c), the leasing powers were similar to this; the Court of Exchequer there held, that the lease was a good lease, as it operated one way or the other. The construction most approved of is, that such a lease operates as a lease for lives, with a contingent remainder for years, provided the lives die within the years; whichever way it operates, it must be pleaded according to its legal effect. It is pleaded here as an alternative lease, when, according to the decision in *Commons v. Marshall*, it is not an alternative lease. The Court will translate the deed into legal language, but not

(a) P. 218.

(b) 1 Ld. Keny. 385 (Hanmer's Edn.)

(c) 6 Bro. P. C. 168.

the pleading of the party ; they have pleaded the habendum of the lease thus, " To hold to Sir *Edward William Crosbie*, his heirs and assigns : " in the lease the words are, " To hold to Sir *E. W. Crosbie*, his heirs *executors, administrators*, and assigns ; the pleading therefore does not follow either the words, or the legal operation of the deed ; yet the omitted words are necessary, *reddendo singula singulis*, so far as relates to the contingent term. The words " *executors and administrators* " are again omitted in the statement of the covenant to repair ; so that here again the pleading neither follows the words of the lease, nor the strict language of pleading, but the deed ought to have been pleaded according to its legal effect *Chester v. Willans*(a) ; *Barker v. Lade*(b) ; *Taylor v. Vale*(c) ; *Moore v. Lord Plymouth*(d). [BRADY, C. B.—The question is, whether the Court can construe the pleading, or whether the words as pleaded have not a certain legal operation ; whichever way it is pleaded, the result is the same—the party cannot hold the lands one hour longer]. The pleader is bound to state the deed according to its legal effect. [BRADY, C. B.—That is, where there are two modes of interpretation]. It seems there are two modes of interpretation here, as the House of Lords have doubted in *Commons v. Marshall* what was the construction of such a lease ; therefore he ought to have stated its legal effect. *Swallow v. Beaumont*(e) ; *Howell v. Richards*(f) ; *Pitt v. Green*(g) ; *Ross v. Parker* ; *Hoar v. Mill*(h) ; *Snell v. Heard*(i).

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(a) 2 Saund. 96. b.

(c) Cro. Eliz. 166.

(e) 2 B. & A. 765.

(g) 9 East. 188.

(i) 4 B. & C. 741.

(b) 3 Lev. 291 ; 4 Mod. 149. S. C.

(d) 3 B. & A. 66.

(f) 11 East. 633.

(h) 4 M. & S. 470.

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BRADY, C. B.—We think that the covenant upon which this action is brought has been sufficiently stated in the declaration. A party is not bound to state more of a covenant, than is sufficient for the purposes of his suit, and therefore it was enough to say, that the covenant was made with the lessor by the lessee, his heirs, and assigns, when setting forth the covenant in this declaration, as the plaintiff here is seeking his remedy against the assignee of the lessee, and is not suing executors or administrators; the covenant is therefore sufficiently stated. We also think there was sufficient evidence for the jury to presume a conveyance by the trustees of the act of parliament to Lord *Mountjoy*. The party to whose use the trustees of the act held the lands deals with them, three years after the passing of the act, as his own; suffering a recovery, and making a conveyance of them to the plaintiff, who remained in possession for thirty-five years subsequently; we therefore think the jury rightly presumed, that the conveyance had been made to Lord *Mountjoy*, as alleged by the plaintiff. Now, as to the question of pleading the lease of 1810, on which so much argument was urged, the legal operation of that instrument was, as in the case of *Long v. Rankin*, a lease for three lives with remainder for so many years as should be existing at the expiration of the lives; but in pleading it is enough to state so much of the lease as will shew, that there has been an estate subsisting in the defendant. It is said, that the plaintiff should have stated the legal operation of this lease; but there are no grounds for saying that there is any possible difference between the deed itself, and the deed as it is stated in the declaration, *Cleyburne v. Piercy* is a direct authority in this case. We do not think the omission of the words “it is witnessed,” makes any difference. The Court will see if there are

sufficient words before them, and will then construe the deed according to its legal effect.

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Cause allowed with costs. (a).

On this day *Smith*, Q.C. and *Berwick*, Q.C., applied for liberty to enter up judgment, *nunc pro tunc*, as of the term in which the *postea* was returnable, under the following circumstances. The defendant by obtaining a conditional order for a nonsuit or to set aside the verdict here prevented the plaintiff from getting judgment; and the cause having stood in the list for a considerable time, the defendant died. On the case being afterwards mentioned, the Court allowed it to stand over, while an opportunity was given of consulting the personal representatives of the defendant, whether they would come in to support the conditional order or not. They did so; and it is therefore of course that judgment should be entered up *nunc pro tunc*; as was done in this Court in a case in which Mr. *Dominick Ronayne* was defendant(b). The rule of English practice is, that if a party against whom a verdict has been obtained die pending a new trial motion, if the rule for a new trial be discharged, the successful party is entitled to enter up judgment as in the life-time of the party deceased. The authorities are collected in *Tidd's Practice*(c).

'Monday
January 18.

Maley, contra.—The plaintiff has been guilty of laches; he ought to have entered a rule for judgment notwithstanding our application; but to this time no rule has been entered for judgment on the *postea*.

(a) Barons Pennefather and Foster were absent.

(b) *Chaytor v. Ronayne*, Jones, 482. 4 L. R. N. S. 171.

(c) P. 932, 9th Edition.

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(The Clerk of the Rules here stated the practice of this Court to be, that no rule is entered, as in England, upon the *postea*; but notice of the motion for judgment is served within four days and the motion is made within six days from the return of the *postea*; but no rule is entered on the *postea* until the final judgment of the Court).

At all events, the order should be so framed as not to interfere with the rights of third parties; *Sidney v. M'Donnell*(a); *Johnson v. Hamilton*(b); *Halpin v. Yeates*(c). [RICHARDS, B.—Will the plaintiff undertake not to interfere with the parties having prior rights as *bonâ fide* creditors, or *bonâ fide* purchasers?]

Berwick.—The rule is, that the party recovering the judgment should be put into the same situation as if there had been no delay of the Court; *Chaytor v. Ronayne*(d.)

RICHARDS, B.—That case merely discussed the jurisdiction of the Court to make the order. What law or equity have you as a creditor by verdict, to interfere with creditors by judgment? The case of *Sidney v. M'Donnell* is quite right. The Court could not make such an order as is required on behalf of the plaintiff.

BRADY, C. B.—When a party seeks to have a judgment amended, the Court of itself always protects intermediate rights. The order, therefore, may be made; but the plaintiff must undertake not to disturb intermediate *bonâ fide* purchasers or *bonâ fide* creditors(e).

(a) 1 L. R. N. S. 152.

(b) 1 Tyr. & Gr. 45, 1 M. & Wels. 49. s.c.

(c) 1 Jobb & S. 494.

(d) 4 L. R. N. S. 171.

(e) Vide *Armstrong v. Lloyd*, 3 Ir. L. R. 57.

DOLAN v. WALPOLE.

1841.

Wednesday,
Jan. 14.
EXCHEQUER
OF PLEAS.

M^cMULLEN moved that the conditional order of the 25th November last, for the discharge of the defendant out of custody, be vacated; in consequence of the defendant not having complied with the terms of the said order. The affidavit of the plaintiff, on which this motion was grounded, stated that in July last the defendant was in the custody of the sheriffs of Dublin, at the suits of several other persons, and that the plaintiff had then lodged a *capias quominus* for £55 0s. 6d. under which the defendant was detained in custody: that on the 25th November last the defendant had obtained a conditional order for his discharge from custody at the plaintiff's suit, under the 3 & 4 Vict. c. 105. on his entering a common appearance; which order on the 15th of December last, was made absolute in chamber, notwithstanding cause. That the plaintiff by the said order was required to pay costs to the defendant; which costs had been taxed, and which the plaintiff was ready to pay. That immediately before this affidavit was sworn, the plaintiff had searched for a common appearance by the defendant, but found none entered, and that the plaintiff had not received any notice thereof. That the want of the entry of the appearance delayed the plaintiff in his suit, and that unless the defendant were to enter a common appearance as of Michaelmas term, the plaintiff would lose the benefit of having judgment in the ensuing term. That the defendant had been for many months in custody on final process at the suit of one *Shine*; and that the defendant's object was to prevent the plaintiff from having judgment

A defendant who has obtained an order under the 3 & 4 Vict. c. 105, for his discharge from custody, on entering a common appearance, will not be discharged until he enters the appearance, and the plaintiff may declare against him as in custody.

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WALPOLE.

pending a motion by the defendant to be discharged from *Shine's* writ of execution ; which motion stands to be argued next term.

BRADY, C. B.—This motion is unnecessary ; for until the defendant complies with the terms of the order by entering a common appearance, he continues in custody at the plaintiff's suit, and the plaintiff may declare against him as against a person in custody. If a party has lain by an unreasonable time, it may be proper for you to come in to set aside the order ; but if a party takes an order that he be discharged from custody on entering a common appearance, he must remain in custody until he complies with the terms of the order, and he may be declared against accordingly. I understand the practice of the office is to require a certificate of the appearance being entered before the order for his discharge will be made out.

SIMS v. THOMAS, Esq. M.P.

1841.

Wednesday,
January 13.
EXCHEQUER
OF PLEAS.

THIS was originally an action of debt brought by the plaintiff, as administratrix of her late husband, *James Sims*, in the Court of Queen's Bench at *Westminster*, to recover the sum of £2,287 10s. upon a bond, dated 24th February, 1817, given by the defendant, Colonel *Henry Thomas*, and *Bartholomew Boyle*, *Thomas Jocelyn*, and *Henry Connor Thomas*, to the said *James Sims*, for the penal sum of £3,000 for securing an annuity of £151. during the lives and life of the three obligors and the survivors and survivor of them. To this the defendant pleaded, first, the insolvency of *James Sims*, the assignment to his assignee, and a sub-assignment to a person named *Strahan*; secondly, payment. There was a replication to the first plea, setting out a deed of assignment, prior to the insolvency, to trustees for the benefit of *Sims's* wife and children, and joining issue on the second plea. The defendant rejoined, that the deed prior to the insolvency was fraudulent, and issue was joined thereon. He also pleaded that there was no memorial filed pursuant to the statute of 53 Geo. III. c. 141, but this plea was subsequently withdrawn.

Debt on an English judgment. Pleas, 1st *nil debet*; 2d & 3d, that the judgment in debt had been recovered by the plaintiff on a bond conditioned for the payment of an annuity, and that by the statute 53 Geo. III. c. 141, the bond was void, no memorial of the same having been enrolled pursuant to the provisions of the act. The Court refused to permit these latter pleas to be amended; but refused also to rescind the rule for pleading several matters, and to strike out these pleas. A foreign judgment is not examinable into here, unless contrary to natural justice, or to the law of the country where it is made, *semble*. It is not, of course, to permit the amendment of pleas before demurrer.

A verdict was given for the defendant on the issue as to the prior assignment, and for the plaintiff on the plea of payment. The plaintiff having obtained a rule absolute for judgment *non obstante veredicto*, judgment was thereupon entered up, as of *Trinity* term last, for the sum of £2,389 5s. on which judgment the defendant brought a writ of error on or about the 25th of June last(a). On the 7th No-

(a) Vid. the cases of *Sims v. Thomas*, 4 Jur. 1181, *Strachan v. Thomas*, id. 1183.

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venember, 1840, an action of debt upon the English judgment was brought by the plaintiff in this Court, to which the defendant had pleaded, first, the general issue; secondly, that the judgment in debt had been recovered by the plaintiff on a bond conditioned for the payment of an annuity, and that by the statute 53 Geo. III. c. 141, (the 2nd section of which was set forth verbatim in the pleading,) the bond was void; no memorial of the same having been enrolled pursuant to the provisions of that act(a). The third plea was similar to the second.

Jackson, Serjeant, with whom were *Litton*, Q. C., and *Rogers*, now moved on behalf of the defendant, that further proceedings in this cause might be stayed, until the writ of error which had been brought by the defendant from the judgment upon which the plaintiff had declared in this cause, and now depending in the Court of Exchequer Chamber in *England*, should have been determined; or for such other order as the Court should direct. The notice of this motion was dated the 27th of November, 1840. Another motion was before the Court on behalf of the defendant, the notice of which was dated the 7th of January, 1841, that the defendant might be at liberty to amend the second and third pleas pleaded by him(b). There was also a cross motion on behalf of the plaintiff before the Court, the notice of which was dated the 7th January, 1841, that the rule to plead several matters in this cause, dated 18th November last, should be rescinded, and that the second and third pleas filed by the defendant

(a) The witnesses to the annuity bond were wrongly named in the memorial; *John Paul Woolley*, one of the witnesses to the bond, was in the memorial called *James Paul Woolley*; and *Arthur Byrne*, another of the witnesses to the bond, was styled in the memorial *Andrew Byrne*.

(b) See the amendment sought to be made.—*Post* p. 27.

in pursuance of such rule should be struck out with costs, and the defendant be confined to his first plea.

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Three motions are now before the Court ; two of which are ours, and one on behalf of the plaintiff. We shall open them all together. We have now a defence upon the merits, of which we were not apprised when we pleaded in England ; it is, that the annuity bond was void for non-compliance with the 53 Geo. III. c. 141. If that defence had been recorded in England, there would not have been judgment *non obstante veredicto* for the plaintiff there. We now seek to amend that defence as already pleaded, by putting in this additional fact, that the defendant being then ignorant of the defect of this enrolment, no plea relying on such defect was pleaded ; and that the said judgment was obtained, the said Court at *Westminster* being ignorant of this defect. All that is necessary to this motion is, that the writ of error is depending ; as we are going on the principle, that a party sought to be affected by a foreign judgment is entitled to have that judgment enquired into to see that it is consistent with the principles of justice ; *Buchanan v. Rucker*(a). [BRADY, C. B.—Is mere omission by a party to make a defence of a technical character grounds for granting such a motion as this ?] The defence here goes farther, indeed, than any reported case. But at present, we only seek to amend the plea. The question is whether a defence, not set up in the Court where the original action is brought, may be set up in an action on the first judgment in another country ; because this bond on which the judgment was obtained is certainly void, though it is sought to have the amount of it levied

(a) 9 East. 92 ; 1 Camp. 67.

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here; *Buchanan v. Rucker*; *Walker v. Witter*(a); *Phillips v. Hunter*(b); *Novelli v. Rossi*(c); *Sinclair v. Fraser*(d).

There is, it is true, no case of allowing the defendant to make a defence subsequently which might have been made in the first instance; but the cases show that a foreign judgment is but a *prima facie* case for the plaintiff, and ought to be enquired into. At all events the Court will not decide this point, which is a new one in Ireland, on motion, but will give an opportunity of carrying it farther. [RICHARDS, B.—If the action were in England on the judgment you would be concluded.] Yes; but it is otherwise in case of a foreign judgment, which is not looked on as a judgment but as an *assumpsit*. *Arnott v. Redfern*(e); *Douglas v. Forest*(f); *Guinness v. Carroll*(g); and the case of an Irish judgment in *Ferguson v. Mahon*(h). At all events it is reasonable that these proceedings should be stayed until the proceedings at *Westminster* are disposed of.

T. B. C. Smith, Q.C., *Napier*, and *E. Ryan*, for the plaintiff.

This motion must be refused: an application cannot be granted to stay proceedings in debt on a judgment on the ground that a writ of error is pending, unless bail be put in error, pursuant to the statutes (i) which are the same in both countries; *Smith v. Shepherd*(k); *Bicknell v. Longstaffe*(l); *Abraham v. Pugh*(m). This motion is founded, according to their notice, on the affidavit of the defendant's

(a) 1 Doug. 1.

(c) 2 B. & Ad. 757.

(e) 3 Bing. 353.

(g) 1 B. & A. 463.

(i) 6 Geo. 4, c. 96, Eng.

(l) 6 T. R. 455.

(b) 2 H. Bl. 410.

(d) 20 How. St. Tr. 468.

(f) 4 Bing. 693.

(h) 3 Per. & D. 143.

(k) 5 T. R. 9.

(m) 5 B. & A. 903.

attorney, Mr. *Meade*, which states only, that "he has
 "been informed and believes that a writ of error from said
 "judgment was issued," but, if a party apply to stay
 proceedings on an erroneous judgment, the affidavit should
 state the cause of error; *Mee v. Hopkins*(a). As to the
 notice to amend, it is a principle that a party should defend
 himself on the first opportunity, and that he cannot go
 behind a judgment by adducing matter which was not put
 forward in the first instance; nor is it here sworn that the
 averment now sought to be put into the plea was not a
 matter well known before. But admitting that the grounds
 of a foreign judgment may be investigated, such a principle
 is not applicable to an English judgment, *Martin v.*
Nichols(b) cited and recognized in *Becquet v. M'Carthy*(c);
 or if examinable at all, it must be in cases notoriously
 wrong on the face of the proceedings, or when the judg-
 ment was obtained by fraud. The defendant's first plea of
nil debet opens the question to him; and he should not now
 be permitted also to plead specially; the Court will not
 allow two pleas where there is a specific defence on the
 general issue. *Cotton v. Brown*(d); *Marsden v. Benston*(e);
 neither are these pleas sworn to be true.

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Litton, Q.C., in reply.—The Court should allow these
 pleas to be amended; under the plea of *nil debet* we could
 not make the defence we have. We seek to go behind the
 judgment on grounds which are a complete defence.
 When a surety is sued, as here is the case, he may fairly
 rely on a technical point: but when the security is of such
 a nature as to be null and void, such a matter is not merely
 a technical point: the section of the statute set out in the

(a) 2 D. & R. 208.

(b) 3 Sim. 458.

(c) 2 B. & Ad. 957.

(d) 3 Ad. & E. 312.

(e) 5 L. R. N. S. 22.

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plea makes the bond a nullity for want of enrolment of the memorial. An Irish judgment, even since the Union, is a foreign judgment in England; *Harris v. Saunders*(a); and it follows, of course, that so is an English judgment here. It has never been decided that you cannot go behind a foreign judgment and plead. *Messin v. Lord Massarene*(b); *Philipps v. Hunter*(c); *Walker v. Witter*(d); *Galbraith v. Neville*(e); *Alivon v. Furnival*(f). Their motion, by refusing to meet us on demurrer, seeks to put the defendant out of court: a demurrer is the proper mode of objecting to a plea, and a motion like that of the plaintiff should be granted only in clear cases of false or sham pleas. At this stage of the proceedings, before argument, demurrer or rejoinder, we are entitled to amend as a matter of course, and would be entitled to do so on a side-bar rule in some of the Courts. [RICHARDS, B.—Suppose a defective plea of payment put in, should you not on applying to amend it, have an affidavit that the demand was paid?] Such affidavit is not necessary now: after joinder, replication or demurrer, it is discretionary with the Court to allow amendment, but now it is a matter of course. Such is the opinion of all around me, and the settled practice of the Court.

BRADY, C. B.—As to the first motion of staying proceedings; if that motion were made in England it should be refused with costs, because no bail has been put in in error, nor is it shown in the affidavit what the errors are. This motion therefore must be refused with costs. As to

(a) 4 B. & C. 411.

(c) 2 H. B. 410.

(e) 5 East. 475, n.

(b) 4 T. R. 493.

(d) 1 Doug. 5.

(f) 1 Cr. M & R. 293, 3 Dowl. P. C. 190.

the second motion and the plaintiff's cross motion, these pleas are novel and have not been shown to have been ever before pleaded; they also involve a question, which if available for the defendant, would lead to the consequence that the party against whom a judgment has been obtained in a foreign court, who has not brought matter of defence then before that Court, can go *de novo* into his defence, not because the judgment was contrary to natural justice, but because he did not make that defence then. But the present question is, whether these pleas should stand upon the records of the Court. We feel disinclined to encourage such pleas; but it is a strong thing to say, you shall not have an opportunity of putting your pleas upon the record, or you shall not have an opportunity of carrying your case farther. The rule is, that false and frivolous pleas may be thus dealt with; but though not inclined to encourage such pleas as these, we will not grant the motion to strike these out. But the defendant has not made a case entitling him to amend his pleading. No case has been stated by him to show that his pleas are true, and the Court will not interfere in this stage of the cause for either party. There can be no rule on either side, either to amend or strike out these pleas.

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RICHARDS, B.—I concur with the opinion delivered by the Lord Chief Baron. I had thought that bail in error had been given in England; but that not being the case, I consider the motion that the proceedings should be stayed to be untenable. As to the application to strike out the defendant's pleas, the court should not exercise that jurisdiction except in a very plain case indeed. We should not prevent any suitor of this court from taking the opinion of the highest tribunal, and especially when, as in the present

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case, the pleas are signed by gentlemen of such professional experience; and indeed where pleas are signed by any members of the bar, who thus pledge their professional reputation, I, for one, am reluctant to deal summarily with such pleas: I would pay respect to the bar, and let the pleas be disposed of by demurrer, writ of error, or otherwise, and give the parties an opportunity of bringing the question before the House of Lords. I refrain from observing on the question as to the right of the defendant to rely on the defence stated at the bar. I consider it would be competent for him to rely on any defence that the judgment was against the law of the land, or against natural justice. To a certain extent, indeed, this judgment is to be dealt with as a foreign judgment. But is this judgment against the law of England? It is not; if it were you might have a writ of error upon it. This was not an undefended suit; and the judgment on record is according to the law of England, as the facts appear on the record; nor is this a judgment against natural justice. It is indeed said, that though £3,000 is advanced by the plaintiff, it is competent for the defendant to rely on a particular statute disabling him from recovering it. But it is also part of the law of England, that a party should put forward his defence in the first instance. I am not relying on the fact of *Thomas* being a surety: he might indeed for ought I know have kept the £3,000 in his pocket; but if he relied on such a defence, he must have put it on record. He relied on some other defence. Is it then contrary to natural justice that a party who has got a judgment according to the law of England, should be allowed to avail himself of it here? Perhaps it is premature to express an opinion; but I shall not be bound by what I have said, should the matter come before us again.

On this day, *Litton*, Q. C. renewed his application for liberty to amend the 2d and 3d pleas pleaded by the defendant to the action. The motion was grounded on two additional affidavits, filed the 18th instant, one made by the defendant's attorney in England, (Mr. *Jackson*, of the firm of *Floodgate, Young and Jackson*), the other by his attorney on record, Mr. *Mende*. The latter stated that the deponent was informed by his counsel, and believed that it was material and necessary for the defendant's defence in this cause, that the 2d and 3d pleas should be amended by inserting in each of the pleas the words "and this defendant further saith that this defendant, being then ignorant of the want of such enrolment of such memorial of the said writing obligatory, no plea with respect thereto, or relying on said defects was pleaded, nor any issue or question raised or taken thereon, in or pending said action, in said Court of Queen's Bench at Westminster; but said judgment therein was obtained without said Court of Queen's Bench at Westminster having been at all informed of same, or of said defect," and that the said 2d and 3d pleas were not pleaded for delay, but *bonâ fide* for the defendant's defence. That the application to amend was not for delay, but for the effectual defence of the defendant on just and fair grounds. It was stated in the affidavit of Mr. *Jackson*, that the plea of non-enrolment of the memorial of the bond pursuant to the statute had been originally pleaded, but had been withdrawn before trial by leave of the Court at *Westminster*, in order to save expense; it not being then known that it was founded in fact, and that no issue was joined in the English Court on this point, nor could such defence have been raised upon the record at the trial, according to the General Rules in England. It

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1841. also stated that it was after judgment in England, in
SIMS February, 1839, that this deponent first discovered the
v. defects of the memorial of the bond, (the misnomer of the
THOMAS. witness's Christian name), and that opinions were taken
on the subject, in which several eminent counsel held that
the bond was void by the 53 Geo. III. c. 141.

Litton in support of the application.—This was conceded the other day to be an action on a foreign judgment. I admit that our plea seeks to go behind the judgment, and that the impression of the court was against the validity of that plea which we now seek to amend; but such a motion as this has never been refused. The officers of the three Law Courts have assured me that before demurrer argued, or replication filed, *a fortiori* before demurrer filed or put in it is quite a matter of course to allow such amendments. Before replication or demurrer the court does not require an affidavit that the amendment is necessary to the justice of the case, nor will it exercise its discretion at this stage of the proceedings, whatever it may do at a subsequent stage. We now have affidavits which would make a complete case even after demurrer filed, and these pleas though on the file for two months, have not yet been demurred to. If judgment had been against us in England on this point it might be unjust to attempt to raise the question again here; but it is sufficient for the present motion that the judgment was obtained in England on different grounds, and that no judgment has been obtained on our present defence, which is all that is sought to be added.

Smith, Q. C., and *Napier*, on the other side.

The statute 6 Anne, c. 10, declares that a second plea

shall not be filed without leave of the Court; and the Court has a jurisdiction, which it very often exercises, of deciding what pleas shall be put upon the file. *Gully v. Bishop of Exeter*(a). This is a plea on a strict statute, and is quite beside the merits of the case. Such an amendment is not *ex debito justitiæ*, 2 *Arch. Prac. K. B.* 841; amendments are only allowed in furtherance of justice. The principle laid down by the Court on the former motion is supported by *Baylis v. Hayward*(b). Ignorance of the defence to be made does not take a party out of the operation of the rule which requires his defence to be put forward at once. But this is not a foreign judgment, *Story Conf. Laws*, 506-7. It is not, indeed, a record in Ireland, but an English judgment, where there is no defect on the face of the proceedings is *res judicata* here, as is laid down by Lord *Hardwicke* in *Boucher v. Lawson*(c). And even if it were a foreign judgment it would be conclusive; *Martin v. Nicholls*(d). This is a record for some purposes, though not for all; *Ferguson v. Mahon*(e); *Murray v. Lennox*(f); was a similar case to this. A similar attempt to this was made before Baron *Richards* in *Graham v. Shaw*(g). This is substantially a motion for adding a plea, which should be refused; *Domville v. Lane*(h). The Court has authority to take pleas off the file; *Gully v. Bishop of Exeter*; *Purvis v. Andrews*(i); and if the Court may go so far, they may surely refuse an amendment. The proper course is to strike out either the general issue or special pleas, when both are pleaded on a foreign judgment; *Alivon v.*

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| (a) 4 Bing. 525. 2 Moore & Payne, 105. | (b) 4 Ad.&El. 256.; 5 Nev.& M. 613. |
| (d) 3 Sim. 458. | (c) Ca. Temp. Hardw. 89. |
| (f) 12 B. Moo. 183. | (e) Per. & D. 146. |
| (h) 1 Cr. & Dix. 182. | (g) 1 Ir. Law Rep. 373. |
| | (i) Hayes, 505. |

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Furnival(a). [RICHARDS, B.—If this defence be available at all, cannot the defendant avail himself of it under the plea of *nil debet*? BRADY, C. B.—On his own argument it is plain that he can do so; he impeaches the consideration of the bond altogether.]

Litton in reply.—The cases referred to are all after issue joined. I did not say that amendment could be had as of course under such circumstances.

BRADY, C. B.—It is contended that this motion is one *ex debito justitiæ*, which the Court is bound to grant; and I confess that if it is a motion to be so granted, it must be ever after be one *ex debito justitiæ*, for, looking at the facts of this case, there cannot be a stronger case against the practice so contended for. I am of opinion that this motion is not one which the Court of Exchequer should grant. I take it to be substantially a motion to add a fourth plea putting in issue fresh facts; and, looking at it in this view, would it not be a motion in which, under the statute of Ann, the Court should use its discretion? This is substantially such a motion; it is a motion either to add a fourth plea, for the purpose of introducing a substantive, independent fact, of which there is no trace in the former pleadings, or to withdraw the second and third pleas, and re-plead them. It is not a motion merely to add a name, and make some such slight alteration; nor one, in which the Court is not bound to exercise its discretion. It is said here, that the application is made on behalf of a surety. I can see no difference that is made by this circumstance: a surety is as much bound to perform his contract as a

(a) 1 Cr. M. & R. 293.

principal is, unless the principal has done some act which releases the surety. This is a case between creditor and debtor, and the same rule must be made here, as if the action were brought by the creditor against the principal himself. The application is, in substance, that after a judgment has been given against the defendant in an English Court of Record, he may be at liberty to re-agitate the matter here; and that without reference to the proceedings which have taken place where the action was originally brought, or to the defence made there, he may make a new defence here, and the Court is called on to be ancillary to that defence. I cannot see that the Court is bound to give any aid to such an attempt, and I for one will not do so. The English act 53 Geo. III. c. 141, requires certain formalities to be observed on the enrolment of the names of the witnesses to an annuity deed; and it is alleged, that there has been in this case a mistake in the enrolment of the memorial. Here we have a *bond fide* annuity deed, and a *bond fide* annuitant seeking to recover a debt already adjudicated upon in England; it is said however that we are *ex debito justitiæ* called on to aid the defendant in setting up a defence, which, if well-founded, would avoid the deed altogether. I cannot think the Court should assist in such an attempt, and this motion must be refused with costs.

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FOSTER, B.—It is the object of this motion, to make this a court of appeal from the adjudication of the Court of Queen's Bench in England. The application is one to our discretion; it is a discretion which the Court should be slow to exercise; and indeed since I have had the honour of a seat here, I do not know that, except in one case, they have refused their permission; but the necessity of making

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the application, and the statute itself, recognize that such a discretion exists, and that leave must be granted by the Court, before such an amendment, as here is sought, can be effected. If ever the Court is to be at liberty to refuse such an application as the present, this is the case; and if we were to grant this application, I cannot conceive a case in which the Court should refuse its assent. The defence relied on is merely the want of a witness's name: that point is wholly foreign to any question of right between the parties. If the party meant to rely on the defence now stated, he should have brought it forward before the English court. The only equity of his present application is, that he has discovered a technical defect, and that he did not set up that unrighteous objection before. We ought not to exercise our discretion in such a manner, as to give to this party the benefit of an objection of the purest technicality; and I think with my Lord Chief Baron, that the motion should be refused with costs.

RICHARDS, B.—In considering this Case, the Court would assume, that the defendant owes the amount of this judgment, unless he can excuse himself from paying it on the grounds, that the provisions of the act of parliament give him a defence. But there has been a plea of payment in England, and judgment has passed against him there; therefore, as far as the English act of parliament gives a defence, he had an opportunity of relying on it there, because he might have demanded oyer of the bond, and compared the names of the witnesses to the bond, with the names in the memorial; and if available, he might have relied on the effect of their discrepancy, as he seeks to rely upon it here. He did, to a certain extent, rely upon

it, because he pleaded that no sufficient memorial was enrolled; he withdraws that plea, having a sufficient opportunity of informing himself of its truth. This I may call default, number one; next, his legal adviser in England says he was aware of the defect in March, 1839, and when the action is brought in Ireland, instructions of the fact ought to have been communicated, but they are not; and the plea is not put in until November, 1840. Well, that is default, number two. Again, a former application was made here to amend the plea—that was refused; a proof that the Court were of opinion, that it ought not to have been made;—it requires a strong case to sustain a second application of a similar character. In examining the thing itself, I do not think I would exercise my discretion in giving aid or sanction to a defence, such as is now sought to be made from the judgment of a superior court. It does not go to the abstract merits of the case: it is not shown, that the judgment is against the law of England, I have considered this matter since the last motion, and I cannot think that you can resist a foreign judgment, when sought to be enforced here, unless you show that it is against the law of the country, in which it has been obtained. Assuming, however, that such a defence is open, the defence relied on here is not of that character; moreover, there is a plea of *nil debet*, and if the defence be good, the facts may be relied on under that plea, but I am of opinion that they do not constitute a valid defence. I therefore concur in opinion with my Lord Chief Baron, that this motion should be refused with costs.

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Motion refused.

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EQUITY
EXCHEQUER
Thurs. Jan. 14.

Where a tenant holds two denominations of land from the same lessor by separate leases and devises one of them to A. and both premises are evicted for non-payment of rent, A. may redeem the part devised to him without redeeming the other.

When the conduct of the landlord has been oppressive and vexatious, he will be made to pay costs of the suit for redemption from after the filing of the bill.

By indenture of lease of the 3rd April, 1805, *Wogan Browne* demised certain premises called the *New Lotts*, in *Kilcock*, in the county of *Kildare*, to *Thomas Newenham*, the father of the plaintiffs, for three lives, with a covenant for perpetual renewal, at the yearly rent of £10. At the same time another lease was made by him of other premises in *Kilcock*, called the *Three Acre Field*, to the said *Thomas Newenham*, for lives renewable for ever, at a yearly rent therein mentioned. The lessor's interest afterwards became vested in one *Robert Fyan*, who having become bankrupt in the year 1815, his estate in both the premises was by indenture of the 8th January, 1816, assigned to *John Pepper*. In 1825, *Pepper* and his partner in trade, *John Locke*, became bankrupts, and an assignment of their estate was executed to three assignees, *Nicholas Mahon*, *W. Henry*, and *J. Stephenson*, of whom the defendants *N. Mahon* and *W. Henry* were surviving assignees. On the 16th November, 1829, a bill was filed in Chancery by *Fyan* against *Pepper* and his assignees, impeaching their title to the said premises, and praying a receiver; and on the 12th April, 1832, Mr. *Henry O'Shea* was appointed receiver in that cause. On the 6th August, 1833, *Thomas Newenham*, the lessee, died, having by his will, dated the 28th October, 1829, devised the premises called the *New Lotts* to the plaintiffs in this cause, *Thomas Newenham* and *Robert Newenham*. In Easter Term, 1834, *O'Shea*, by order of the Court of Chancery, brought separate ejectments, for non-payment of rent, in the Queen's Bench, for the *New Lotts* and for the *Three Acre Field*, to which defences were taken

by *Thomas Newenham*, and which were tried on 30th March, 1835; notice of disputing the bankruptcy of *Pepper* and *Locke* having been served by the defendant, the jury found a verdict for the lessor of the plaintiff in each of the ejectments, and the rent due at the bringing of the ejectment for the *New Lotts*, was then ascertained to be £27 13s. 10d. A bill of exceptions on the same grounds, namely, that the heir-at-law was not served with the ejectment, was taken by the defendant in each ejectment, which were over ruled in Hilary Term, 1836. On the 2nd March, 1836, the writs of habere were executed, and the lessor of the plaintiffs was put into possession of both these premises. In the interval between the verdict and the execution of the habere, *O'Shea* had been removed, and Mr. *Epsworth Luscombe* had been appointed the receiver in his stead. In June, 1836, a relative of the defendant, named Patrick Halligan, advanced to the plaintiffs money to redeem the premises called the *New Lotts*, and applied to Mr. *John Scott Molloy*, the attorney for the defendant and for the receiver *Luscombe*, for an account of the amount claimed for rent and costs in that cause, which *Molloy* declined to furnish, notwithstanding repeated applications. On the 27th August, 1836, the following notice was served upon *Molloy*, entitled in the ejectment cause, and directed to him, the assignees of *Pepper* and *Locke*, and *Luscombe*, the receiver:—"Gentlemen, inasmuch as it is my intention, "as the next friend of *Thomas Newenham* and *Robert Newenham*, his brother, at present minors, who are "interested and have title to the houses and premises, "situate in the town of *Kilcock*, and county of *Kildare*, "and known by the name of the *New Lotts*, the subject "matter of the ejectment in this cause, to redeem the said

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 NEWENHAM “ fore made to *J. S. Molloy*, Esq. the attorney for the
 v. “ lessors of the plaintiff in this cause, for an account of
 MAHON. “ the rent and costs claimed in this cause, which was
 “ refused, I hereby require you to furnish, or state the
 “ amount claimed by you, or any of you, on foot of
 “ said rent and costs, which I personally undertake, as
 “ their next friend, forthwith to pay, in order to redeem
 “ the said premises, and also to go before the proper
 “ officer, if necessary, to ascertain the exact amount ; and
 “ if you refuse this offer, and that it thereby becomes
 “ necessary to file a bill for the purpose of redemption,
 “ this notice will be made use of, to seek to charge you
 “ with costs.” “ Signed, *Patrick Halligan*.” To this no
 answer was returned. On the 21st June, 1836, a notice
 was served on behalf of the defendant in the ejectment of a
 motion in chamber, to compel the plaintiff in the eject-
 ment to proceed to tax his costs in the ejectment,
 brought for the *New Lotts* ; this motion, for reasons
 which did not appear, had been refused. *Luscombe*, the
 receiver, was at this time absent from the kingdom, and
 the person employed for that purpose was not able to
 obtain an interview with *Molloy*, or any of the defendants,
 except *Mahon* ; but on 29th August, 1836, he tendered
 to *Mahon* the sum £150 for rent and costs, which *Mahon*
 refused to accept. On the following day another notice,
 as follows, was served on *J. S. Molloy* :—“ Sir, Inasmuch
 “ as no answer was returned to my notice of the 27th
 “ August, and inasmuch as I am still ready, on behalf of
 “ the defendant and his brother, *Robert*, to pay any sum
 “ claimed for rent and costs due on the ground known by the
 “ name of the *New Lotts*, the subject matter in this cause,
 “ and inasmuch as the receiver appointed over the said

“lands is not in Ireland, I will, at the hour of 12 o'clock
 “to-morrow, attend at the office of *John Scott Molloy*, Esq. 1841.
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 “attorney on record for the lessor of the plaintiff, and
 “will then and there pay such rent and costs; and this
 “notice will be made use of to seek to charge the costs
 “of any proceeding, requisite for the redemption of the
 “said premises.” “Signed, *Patrick Halligan*.” *Molloy* did
 not attend at his office at the time appointed; but the person
 who had called there pursuant to the notice, met *Molloy*
 on the same day in the street, and there tendered him
 £150 in notes, which *Molloy* refused, saying, “If it was
 “for no other reason, he would not receive the tender,
 “because it was not all in gold.” On the 1st September,
 1836, this bill was filed by the plaintiffs, and the sum of
 £150 was lodged in Court by them: on the same day
Molloy furnished *Halligan* with an account of the sum due
 for rent and costs, in respect of the *New Lotts*, amounting
 to £175 10s. and with an account of the sum due for
 rent and costs in respect of the *Three Acre Field*, amount-
 ing to £155 15s; at the same time apprising *Halligan*,
 that he did not thereby admit the plaintiffs' title to redeem,
 and that the receiver could not interfere without an order
 of the Court of Chancery. The defendants *Mahon* and
Henry, by their answer, admitted the ejectment to have
 been brought as stated for the *New Lotts*, and alleged
 that the receiver had, of the same term and in the same
 Court, brought another ejectment for non-payment of
 rent for the other premises, called the *Three Acre Field*,
 which had been also held by *Thomas Newenham*, the
 father, and that a verdict was found for the plaintiffs in
 the latter ejectment, ascertaining the rent for the premises,
 called the *Three Acre Field*, at £57 5s. They alleged,

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that a bill of exceptions was taken in the latter cause also, and overruled. They admitted the application made to *Molloy* for an account of the rent and costs of ejectment of the *New Lotts*, and alleged, that *Molloy* had refused to furnish them, because they had not been taxed, and because he was under the impression that the offer was not made *bond fide*. They also admitted, that they had heard of the offer made to *Molloy* of £150, which sum he had rejected as insufficient. They relied on three grounds of defence to the bill :—1st, That the plaintiffs had no estate in the premises sought to be redeemed. 2ndly, That a sufficient sum had not been lodged in Court for rent and costs. 3rdly, That the plaintiffs should not be permitted to redeem the *New Lotts*, without also redeeming the *Three Acre Field*. On 2nd May, 1839, it was ordered, that the cause should stand over, that the costs in ejectment should be taxed, and that the defendants should furnish copies of his bills of costs to the plaintiff. The officer apportioned the costs of the witnesses as between the two cases of ejectment. The defendants being dissatisfied with this mode of taxation, on the 16th November, 1839, applied that the taxation should be reviewed; and the bills of costs after re-taxation were divided into the costs of *nisi prius*, and the costs of the argument of the bill of exceptions. The costs, in respect of the *New Lotts*, were thus ascertained to be £147 14s. 8d.

Mr. Smith, Q.C. and Mr. James Plunket.—The only question here, independently of the question of costs, is, whether we can come in to redeem the denomination of the premises in our lease without redeeming the other also. Equity does not connect the right to redeem with extrinsic

matter; *Swanton v. Biggs*(a); *Trant v. Dwyer*(b); but even if this objection could be relied on at all, it cannot be relied on in the present case; for the only set of premises to which the plaintiff has a title are the New Lots.

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Mr. *Bennett*, Q. C. and Mr. *J. Radcliff* for the defendants.

The defendants resist the alleged equity of the plaintiffs, submitting that the plaintiffs have no *right*, as such, to redeem in any case where an *habere* has been executed; but that the defendant may resist such a bill, and show that it should be dismissed; or that the equitable relief sought by the plaintiff will be granted only on certain conditions. The questions here are, first, [whether the plaintiffs may be entitled to relief at all; secondly, whether they may redeem one of these denominations without the other; and whether, if so, the decree will be made without payment of all costs. All these questions are open to the Court. As to the tenant being entitled to relief, the right to redeem is not a right, but an equity; and this is shown by the acts of parliament; for if before the acts a party having a lease and having suffered the rent to be in arrear was evicted at common law, he might have filed his bill to redeem, not of right, but he should show a good equitable case. The 4 Geo I. c. 5, does not enact that there should be an imperative equity, but that relief shall be given as in the former act, 11 Ann. c. 2, which only states that no injunction shall issue but on payment of rent and costs. Filing a bill will not of itself entitle him to relief, no matter how the tenant has conducted himself; *Berney v.*

(a) Beatty 170.

(b) 2 Bligh, N. S. 11.

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Moore(a); Lord *Kenmare v. Supple(b)*; and in all such bills the tenant has been made to pay the costs; *Biddulph v. St. John(c)*. So in *Bodkin v. Vesey(d)*; *Wilde v. Manly(e)*; *Butler v. Burke(f)*. I do not contend that in a case of this kind the Court may not give relief without costs, or that the landlord can set up a totally separate case for nullifying the plaintiffs equity; but he may show such misconduct as would disentitle the tenant to relief. Here the tenant has taken up in vexatious litigation the six months given him by the act to collect his rent and file his bill. In one ejectment, the rent for one denomination up to March, 1834, was ascertained to be £27 10s.; in the other ejectment the rent for the other denomination to the same period, was ascertained to be £54. The bill is filed to redeem the former denomination, and the rent of the other is still unpaid. The tender has been made to the assignees of *Pepper*, not to the receiver in the cause; and the plaintiff's case amounts to this—we will redeem one denomination at half the expense of the costs of trial, and we will leave the landlord the other denomination burdened with as much rent and costs as we can. If a mortgagor makes mortgages of two separate denominations of lands for two separate debts, and afterwards comes to redeem one denomination, the Court will not let him do so, unless he redeems both; *Ex parte Carter(g)*. The same principle is recognized in *Rayson v. Sacheverell(h)*; *Shuttlebrook v. Laycock(i)*; *Ireson v. Denn(k)*; *Willie v. Lugg(l)*; *Margrave v. Lehooke(m)*;

(a) 2 Ridg. 310.
 (c) 2 Sch. & Lef. 521.
 (e) 2 Mol. 413.
 (g) Amb. 733.
 (i) 1 Vern. 245.
 (l) 2 Eden 78.

(b) Vern. & Scr. 1.
 (d) Jones 139.
 (f) 1 Dru. & W. 380.
 (h) 1 Vern. 41.
 (k) 2 Cox. 425.
 (m) 2 Vern. 207.

Jones v. Smith(a); *Pope v. Onslow*(b); *Powell on Mortgages*(c). [BRADY, C. B.—The principle of the mortgage cases seems to be, that if one of the denominations be insufficient, the mortgagor should not be allowed to redeem one without the other. Is it shown that one of these is not a sufficient security for the rent?] The principle is general, and is so stated in *Pope v. Onslow*. [RICHARDS, B.—Is there any of those cases against a purchaser, to show that if a mortgagor sells his equity of redemption, the purchaser will not be let in to redeem one without the other.] That is so decided in *ex parte Carter*. [BRADY, C. B.—We do not feel inclined to extend that principle.] This is a stronger case; for here the tenant gives up the worse and retains the better interest. [BRADY, C. B.—Is this a giving up? the landlord takes it *in invitum*.] If the rule which has been applied to mortgagor and mortgagee establishes a principle, why not apply it to landlord and tenant? It is contended here that the debtor may pay part of the rent, and get back part of the land. Next as to the tender;—*Molloy* could not accept this money when all the affairs of the property were managed in the Master's office. He stated that he would not take it, if he had no other reason, because it was not made in gold, a legal tender should be so made. [RICHARDS, B.—A tender in equity affects the question of costs whether made in gold or notes.] The authorities show that the tenant should pay costs; *Bodkin v. Vesey*(d); *Biddulph v. St. John*(e); *Wilde v. Manly*(f). [RICHARDS, B.—There is no doubt of the general rule.] The cases all lay it down as a favour to the tenant to be allowed to redeem, and he must pay costs;

(a) 2 V. J. 372.

(c) Vol. 1. p. 340.

(e) 2 Sch. & Lef. 521.

(b) 1 Vern. 286.

(d) 1 Jones 139.

(f) 2 Mol. 413.

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1841. *Butler v. Burke*(a). [RICHARDS, B.—It is said in Mr. *Longfield's* work on ejectment(b), that the statute is imperative, and that it was so decided by Lord *Manners*]:
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Mr. *Plunkett* for the plaintiff.

Kenmare v. Supple was a question of tender, and does not rule this case. The right of the tenant to redeem is now recognized; *Wadman v. Calcraft*(c); *Swanton v. Biggs* has decided that breaches of covenant in another lease cannot be brought forward in bar of the plaintiff's equity; but the statute is imperative if its requisites be complied with. The Court will not presume in favour of a forfeiture; *Cage v. Russell*(d); *Sanders v. Pope*(e); all that the tenant was bound to do has here been done; *Davis v. West*(f); and even if his proceedings were litigious, he has had to pay the costs of them. We are but devisees of one denomination of the estate, and are not entitled to redeem the other denomination, as we are now called upon to do. The defendant has pertinaciously refused to furnish his costs. It has been held in this Court, that in a case where there was no proof of a tender having been made by the tenant, and where the sum paid was not sufficient to cover the rent and costs, yet, on account of the landlord's conduct, redemption was decreed against him; *M'Inchery v. Galway*(g). That cause was finally heard in June, 1840, and no costs on either side were given. We have made a series of applications to the landlord to prevent litigation, the first of which was the notice of 21st June, 1836, calling on the

(a) 1 Dru, & W. 380.

(c) 10 Ves. 67.

(e) 12 Ves. 282.

(g) 1 Jones & Carey, 247.

(b) pp. 216, 222.

(d) 3 Vent. 472.

(f) 12 Ves. 475.

defendant's attorney to furnish his costs, in order to enable the defendant to redeem the *New Lotts*. It was stated, that there was no person to give an account of the costs, because the defendant was a minor. In *Lessee Malone v. Keogh*(a) when an application was made to tax costs, the Court would not interfere, because a bill had been filed. In *Biddulph v. St. John*, the defendant, the landlord, got his costs, because the plaintiff came for a favour, having no right under the statute to redeem; so in *Beasley v. Darcy*(b), the plaintiff was not within the statute, yet nothing was said of the costs; *Butler v. Burke* was also not within the statute, for no rent had been lodged till after the six months, though there was a waiver of the forfeiture. *Berney v. Moore*, has no application to the facts of this case, and this certainly is a case where the Court should exercise the power, which it undoubtedly possesses, of awarding costs; for it is manifest, that the conduct of the defendants all through, was a tricky contrivance to work a forfeiture.

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BRADY, C. B.—This bill has been filed for the redemption of premises evicted for non-payment of rent. The short facts of the case are these: On the 3d April, 1805, two leases were made to the father of the plaintiffs in this cause, for lives renewable for ever, by the person whose interest the defendants represent; one of these leases, the subject of the present suit, was made at the rent of £10 per annum. The plaintiffs are the children of this lessee, and they claim under the will of their father the premises comprised in that lease; the defendants are assignees of the reversion and claim under an assignment in bankruptcy. An ejectment for non-payment of rent was brought in 1834,

(a) Batty 66.

(b) 2 Sch. & Lef. 403.

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which was tried in 1835 ; and the rent then due was thereby ascertained. On the 2d March, 1836, the *habere* was executed, and this bill is now filed by a person named *Halligan*, as the next friend of the plaintiffs, who are minors, and with this bill £150 have been lodged in Court for rent and costs. The first question is, whether the plaintiffs are to be relieved ? It appears that the bill was filed in due time ; and that with the bill £150 have been lodged in Court, which ultimately turned out to be two or three pounds more than the sum due for rent and costs. We are, therefore, now to suppose the plaintiffs to be legally entitled to redeem, and that there is no difference between this case and the ordinary cases of bills for redemption ; however, the right to redeem is resisted on this ground, that there has been on the part of the plaintiffs here vexatious opposition to the landlord ; and that bills of exceptions were tendered, and points made, which have been overruled in the landlord's favour. It is further contended also, that the Court will not permit these parties to redeem, unless they also redeem other premises which have been demised by a separate lease. Two leases were originally made of these premises, separate ejectments have been brought on each lease, the same points have been made in both ejectments, and bills of exceptions have been argued on both, which bills of exceptions have been overruled. It has been contended that upon the analogy of a mortgagor who on coming in to redeem one of two sets of premises, subject to the mortgage debts, should redeem both, that the lessee of two leases, both of which have been evicted for non-payment of rent, cannot save the forfeiture of one without redeeming the other. I do not see on what grounds that position could be rested. It has been established in cases of mortgages ; but I should require strong

authority to convince me that a landlord who has taken possession of two separate premises in two separate ejectments, can retain one of them against the tenant who comes to redeem it, because he does not also come to redeem the other. I think that principle cannot be sustained; but in point of fact, it fails in this case, because the plaintiffs in this suit have no claim to the other premises, for they claim under the will of *Thomas Newenham*, and have no title to those other premises. We could not hold that a party should redeem premises to which he is not entitled, and from which, if he did redeem them, he might be evicted. On these grounds, I think there are no reasons to sustain the defence here set up, and that the plaintiffs are entitled to redemption.

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The next question is as regards the costs. Much discussion took place concerning this point. The *habere* was executed on 2d March, 1836, and it appears uncontestedly that repeated applications were made to the agent of the defendant to let the plaintiffs know what amount of costs they were liable to pay. These applications were not complied with, but peremptorily refused; for it appears in the cause that a motion was made in the Queen's Bench to have these costs furnished and taxed. This motion was refused, upon some grounds, I presume of a technical nature, but that motion was refused. Again in June, 1836, application was made to the solicitor of the defendants, and on 27th August, 1836, a notice in writing was served upon all parties. On the 29th August, a tender was made to *Mahon*, who, however, refused it, and alleged that he had no right to receive it. On the 30th, notice was served that *Halligan* would attend at twelve o'clock the next day, at *Molloy's* office, for the purpose of

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MAHON. paying the amount of rent and costs ; apparently no such meeting, however, took place ; but the person sent met *Molloy* in the street, and actually tendered £150 to him, which he refused, alleging that if for no other reason, he would not accept the tender, because it was not made in gold. After this tender was made, no further proceedings were taken until the bill was filed. It appears also, that the costs have been taxed, and that upon a principle successfully contended for by the plaintiffs, which brings them to an amount of £147 14s. 8d., £1 or £2 short of the amount of the tender made. Under these circumstances there are strong grounds for inferring a studied evasion on the defendant's part to furnish them, and yet the Court is now called on by the defendants to give them costs. I do think it would be a strong temptation to put parties to vexatious and expensive proceedings, if at all hazards, the landlord were to be held entitled to have his costs. If the landlord is not to have his costs, the next question is whether the plaintiffs are entitled to any costs ?

The receiver, or his agent, Mr. *Molloy*, had, doubtless, a right to interfere in this matter, and the Court cannot say that the tenant is to be embarrassed by the condition in which the inheritance is placed. There is no trace of the real title in the ejectment, and the point contended for there was, that so far from the defendants in ejectment having the real title, the real interest was in the heir-at-law. That was their defence. There may have been, therefore, some doubt in the minds of the landlords about the title of the plaintiffs here ; and under these circumstances, I think the plaintiff is not to have the costs of filing this bill. But why has the case been brought to a hearing ? The defendants resisted the title of the plaintiffs,

and contended that the plaintiffs were obliged to redeem both premises. On both these grounds already alleged, the defendants have failed; and so far from the plaintiffs being obliged to redeem both these premises, they have no title whatever to one of them. Upon the whole, this bill has been brought to a hearing on grounds which have been successfully resisted, and of which I cannot approve; I think, therefore, the costs from the filing the bill and the order to lodge the money should be paid by the defendant. But, it is said, there is no precedent of giving the costs against the defendant. I think it would be going too far to say, that this is the first time in which it has been done. There are two classes of cases—that of mortgagor and mortgagee, and that of landlord and tenant, in which this question has been raised. The general rule in those cases is the same as in this; costs are given in those cases, because the Court gives the benefit of a legal title to the person from whom it is sought to be divested; but there is no inflexible rule that the landlord or the mortgagee is in all such cases to have his costs. There are cases which decide the principle of this; *Dryden v. Frost*(a); *Harvey v. Tebbutt*(b); *Detillen v. Gale*(c). In the last of these cases the Lord Chancellor admits the general rule, so long as the mortgagee acts reasonably. Now here, if a mortgagor is to be regarded as a tenant redeeming his lands from forfeiture, I apprehend that the Court would regard the latter with greater favour, and would lean more to enabling him to redeem that forfeiture. It has been said in some cases, that the right of the tenant to redeem is imperative; but whether imperative or not, it has been long a settled

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(a) 3 Myl. & Cr. 607;
(c) 7 V. J. 583.

(b) 1 J. & W. 197.

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 MAHON. principle that a party coming in within the time specified by the act, filing his bill, and lodging the amount of rent and costs, is entitled to a decree for redemption almost as a matter of right.

Generally, the landlord is, in a bill for redemption, entitled to his costs, but that rule is not without its exceptions. In *Hill v. Megan(a)*, Lord *Manners* says, “where there is no doubt as to the tenant’s right to renewal, and he is obliged by the refusal of his landlord to file a bill for that purpose, he must have his costs.” A case has been referred to, decided in this Court, that of *Hall v. Smith*, in which costs were given against the landlord. I do not go into the facts of that case, but merely quote it to show that the rule is not universal. On these grounds, I think the landlord must pay the costs of these proceedings, since the bill was filed, and the order for payment made.

FOSTER, B.—In this case no question can, at least since the argument, be raised, of the tenant’s right to redeem; the only question is, whether he or the landlord must pay the costs? The general rule is, that the tenant is to pay them; and that a mere mistake of the landlord as to the nature of his rights, would not disentitle him to them. But I cannot say, that if a landlord adopts that course as the real means of accomplishing the forfeiture he is to have them. I see no decision that ought to interfere with our making the landlord pay the costs of this most unrighteous proceeding. It is said the tenant has offered vexatious and litigious opposition; but if he did he has had to suffer for it, and to pay near £150 of costs. But all that is now

(a) 2 Moll. 460.

settled, and forms no part of the present proceedings. The question is, whether the landlord by captiously refusing to comply with what it was the plain right of the tenant to demand, has made himself liable to costs. The landlord has set it up in this case as a defence, that the tenant was not entitled to redeem one set of premises without the other. The first answer is, that the tenant has not a right to redeem both. But even if he had, there is no coercive rule that the tenant shall not be permitted to abandon one interest and take the other. There is no such principle. The tenant lodged in court £150 to pay rent and costs; before that he had tendered £150 to the landlord, which was refused. It turns out to have been a nice calculation; and if this sum had been insufficient, it might have given rise to another question; but fortunately for the plaintiffs, it was sufficient, and no such question arises. The landlord had no excuse for putting the tenants to the subsequent expenses; when he was called on for the amount of his costs against the tenant, he should have furnished them; and I am at liberty to assume that it was from a mere wish to oppress the tenant that he has not done so. The tenant, however, paid £2 more than what the landlord was entitled to; and the cause came on to a hearing. It would be going too far to say, that the tenant should not pay the expenses of filing the bill; but from that out, I do not see any excuse for the proceedings which the landlord has forced the tenant to adopt. It does not appear that there was any rational excuse for the landlord, and I think he ought to be made to pay the costs. I say he ought, because, though it is unusual to make the landlords pay costs in such cases, the thing is not without precedent. If there were only one precedent, I should like to shelter myself under its authority, and as in the case cited by the

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RICHARDS, B.—This case was strongly and ably argued, as far as the facts afforded an opportunity of arguing it, by counsel for the defendant; and I think it right to state very briefly, the grounds on which I have come to the same conclusion as the rest of the court.

Three questions have been raised by the defendants;—1st, that the plaintiffs cannot be allowed to redeem; for it is said that the landlord having brought contemporaneously with this ejectment, another ejectment, for other premises, the tenant cannot be allowed to redeem the premises, the subject of this ejectment, unless he redeem the other premises likewise. An answer has been given to that question, that the plaintiffs are not bound to redeem the other premises; but I think the best answer to that proposition is, that the plaintiff had no right to redeem the other premises; yet it is now contended that a Court of Equity should say, the plaintiffs shall not be allowed to redeem one of those holdings unless, at the same time, he redeem the other also. I think this proposition wholly untenable. The next ground upon which we are called on to decide against the plaintiffs is, that the counsel for the minor at the trial of the ejectment made a point of law which led to a bill of exceptions which was over-ruled, and therefore the landlord says that was good ground why the tenant should not be allowed to redeem. But this argument is most fully answered by the fact that he was obliged to pay the costs incurred by the point made by his counsel at the trial; yet on these two unfounded grounds, the tenant who holds

these two acres of land is forced first to file his bill in a Court of Equity, and then to bring that cause to a hearing. This decides the next point, whether this tenant should be made to pay the costs of a very heavy and expensive suit. It has been strongly impressed upon the Court that they were bound to give the landlord the costs of this suit. But if a landlord may make whatever defence he likes, and that there is a certainty of his not paying costs, but of having his tenant to pay them out of his own pocket, that would be allowing the tenant to have redemption on the terms of paying the heavy costs of an equity suit at both sides. That is not what the legislature intended, nor is it a position proper to be argued. Well : but if the tenant is not to get his costs, the landlord, it is said, is not to pay costs ; it is alleged that we have no jurisdiction to make the landlord pay costs. I do not say any thing of the costs of the filing of the bill, and of the order to lodge the rent. It is possible that the Statute is imperative that the tenant should file his bill and pay the costs of it, and I do not say that is not a sound construction of the Statute : I therefore must say that the tenant is not to have the costs of filing the bill. But with respect to the subsequent costs, I do not conceive the landlord is privileged to rest his cause on an unfounded defence, and then to tell the tenant that though he may overthrow that defence, yet the landlord shall have the costs of making it. If the Court were to make that decision it would open a door to great oppression ; for what has a wealthy landlord then to do but to say, I shall execute my *habere*—I will not take your money—you must bring your cause to a hearing. Why, tenants in this country could seldom indeed redeem under such circumstances as these. I therefore think that unless the Act contain some express words which make it imperative on us

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to do so, this court will not dispense with what is the inherent jurisdiction of Courts of Equity in questions of costs, that of awarding them according to the conduct of the parties ; it is one of the most important parts of its jurisdiction, and the Court always awards costs as justice may require. Taking it for granted that the defence set up by the landlord was erroneous, I shall just state two or three circumstances which I think enable us to understand his real motive in this transaction. First, the notice of the 26th June, 1836, is directed to Mr. *J. S. Molloy*. Now, nothing could be fairer than that notice ; it says, the time is nearly expired, and the plaintiffs agent will attend at *Molloy's* office to pay the rent and costs. I do not hesitate in saying that it was the duty of *Molloy* to have afforded every fair opportunity to the plaintiffs to have the amount of their costs ascertained. I think such should have been the conduct of an attorney entrusted with the conduct of that cause by the Court of Chancery. But he, it appears, had gone out of the way ; however, the gentleman sent on the plaintiffs behalf met him in the street, and offered him a sum of money for the rent and costs, which he refused. I ask is this the way in which this gentleman should have met such an offer ? We must visit Mr. *Mahon* and the other defendants with the costs on account of the proceedings of the person whom they have entrusted to manage matters on their behalf. The tender is refused ; and we then have a notice served by *Molloy* in reply ; these tenants, holding at a rent of £10 a year, are told they cannot be allowed to redeem without an order in Chancery, and it is sought to embarrass them by the embarrassments of their landlords, over whose property a receiver had been appointed. I therefore think this suit could only have been intended to embarrass the tenants.—A tender is first made

to the lessor of the plaintiff, *Mahon*, the receiver then being in England ; then there is a notice by *Molloy*, in which he states the costs of both the ejectments, and concludes by saying that this information is given without thereby recognizing the tenants right to redeem. Are those tenants to be compelled to go into a Court of Chancery for a reference as to whether it would be for the benefit of the estate that they should be suffered to redeem ? I never heard of such a thing ; I think the defendants will find they are mistaken in this. They ought to apprize the Court of Chancery or the Master of the Rolls of the offer to redeem ; but all that was between the receiver and his employer ; and I think this shows the vexatious nature of this case. Then we have the answer, which leaves no doubt of the intention of the defendants. They say that *Molloy* refused to furnish his costs, because he was under the impression that the offer to redeem was not made *bond fide*. How that answer could have been made after a tender of more than the amount of rent and costs I do not know ; and if there were no other reason for fixing them with costs, their answer, actually after a tender of the rent and costs, saying thus, that *Molloy* believed the parties had no intention of redeeming, would be sufficient.

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This case was called on and partly heard on the 20th May, 1839, and it was then ordered that the costs should be taxed. After a great deal of vexatious delay, the costs have been taxed and found. I think this a case in which the landlord should be liable for the acts of his agent, as to the costs of this suit. As to the costs of filing the bill, and of the order to lodge the money, that is a distinct consideration. The tenant cannot have these. The decree will be as in case of *Swanton v. Biggs*.

SCOTT, Executor of SCOTT, v. ROOSE and Others.

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EQUITY
EXCHEQUER

Thurs. Jan. 14.

A having promised B, his clerk, to increase his weekly salary, if B would insure his own life and assign the policy to A; B did so, and without consideration, assigned the policy to A, who shortly after dismissed B from his service on unfounded pretences. On a bill filed by the representatives of B, the assignment was declared void, and the amount of the policy, (deducting the premiums which were proved to have been paid by A,) was decreed to be handed over to the plaintiffs, and the defendant was made to pay costs.

THE original bill in this cause was filed the 18th January, 1839, against the defendant *J. C. Roose* and *Thomas Price*, *Thomas Smith* and *Hewley Graham*, three of the directors of the *Yorkshire Fire and Life Insurance Company*, and stated that *John Scott*, attorney, now deceased, became in the year 1833, conducting clerk to the defendant, *J. C. Roose*, at a salary of £52 10s. per annum, and so continued until January, 1836. That on the 29th October, 1835, while so employed, *John Scott* effected an insurance on his own life with the *Yorkshire Fire and Life Insurance Company*, (a) for the sum of £500, on payment of a premium of £22. That soon after the insurance was effected, a proposal was made by the defendant *Roose*, that *Scott* should assign the policy to *Roose*; *Roose* proposing to augment *Scott's* salary as such clerk; and that upon the faith of the expectations so held forth, *Scott*, about the 16th December, 1835, assigned the policy to *Roose*, by an assignment, indorsed thereupon. The bill charged that no sum of money was ever paid as a consideration for this assignment; but that a blank was left for the consideration in the indorsed assignment, which blank was not filled up at the time of its execution, nor at any time subsequently by the said *John Scott*, or with his knowledge, privity, or consent; and that the plaintiff had, since the death of *John Scott*, been well informed that a certain word or figures had been introduced into the assignment, for the purpose of

(a) One of the conditions annexed to the policy, required that the insurer should have an interest in the life insured.

giving validity thereto. That the policy being so assigned, the defendant *Roose*, about 1st of January, 1836, dismissed *J. Scott* from his employment without any just cause. That *J. Scott* being under the impression that this assignment was void, after his dismissal from the employment of *Roose*, bequeathed the policy by a codicil to his will, dated 14th February, 1837, to certain members of his family. That a second premium being paid on the policy, it continued in force to the time of the death of *John Scott*, which took place on the 17th June, 1837. This bill prayed that the assignment of the policy might be delivered up to be cancelled, and that the defendant *Roose* might be restrained from proceeding to recover the amount of the policy, and that the said directors might be directed to pay over the same to the plaintiff, as executor of the said *John Scott*.

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Roose, by his answer to this bill alleged, that the sum paid for the premium and stamp on the policy, amounting to £22, were paid by him; *J. Scott* having agreed to assign the policy to him; that the proposal for making such assignment came from *J. Scott* himself; and that the agreement between *J. Scott* and this defendant was, that *J. Scott* should assign the policy to him in consideration that *Roose* should pay the premium and expenses thereof, and increase *J. Scott's* salary by five shillings weekly, while he (*Scott*) was in *Roose's* employment. The answer also alleged that *Roose* paid *J. Scott* an increased salary of five shillings a week from the date of the policy, and that he was obliged to dismiss *J. Scott* for misconduct, in having kept to his own use money sent to the defendant *Roose*, in a letter from a Mrs. *Tench*, one of the defendants clients. It was admitted that a blank had been left in the assignment for the consideration; alleging, as the reason for its not

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being filled up, that the agreement between the parties was, that *Roose* should pay the five shillings a week ; and the defendant relied on a receipt from *J. Scott*, in full of all demands, dated 9th April, 1836, on a five shilling stamp receipt, for £3 11s. 10d. as evidence of *J. Scott's* acquiescence in the final settlement of his claims ; and denied the subsequent filling up of the blank. The answer also alleged that a second premium on the policy was paid by *Roose*, on the 2nd November, 1836. The plaintiff, on the 19th November, 1839, filed his amended bill, stating that the Directors of the Insurance Company had, pursuant to the order of this court, of the 9th November, 1839, lodged the money secured by the policy in court. That before the filing of the original bill, the plaintiff had served a notice upon *Roose* offering to pay him all sums advanced by him on the assignment or in payment of the premium. That the receipt in full had nothing to do with the policy or assignment, but to *J. Scott's* salary. It was further stated in the amended bill, and appeared by the evidence of Mr. *Ramsay*, the agent of the Insurance Company, that after the death of *J. Scott*, the defendant called at the Insurance office to demand the amount of the policy, and that at that time the sum of £50 was inserted, written in ink in the assignment of the policy as the consideration thereof. It was also stated and appeared in evidence that soon after the death of *J. Scott*, the defendant was desirous of disposing of the policy, and having deposited it in the hands of a Mr. *Gray*, no blank then appeared in the assignment, but the consideration was expressed by the word " Fifty " written in ink, which had since been erased. The amended bill prayed that the assignment might be declared fraudulent and void, and be delivered up to be cancelled ; the plaintiff undertaking to pay the defendant

all sums expended by him in keeping up the policy, with interest, that the plaintiff might be declared entitled to the sum lodged by the Insurance Company in court, and that the defendant might be decreed to pay the sum deducted thereout, for their costs, as well as the costs of the suit. The answer to the amended bill accounted for the filling up the blank by alleging that, after the death of *J. Scott*, £50 was written in pencilling, by a clerk in the office of the defendant's father, without the approbation or knowledge of the defendant, but denied its being filled up with ink ; it also stated the pencilling to be now rubbed out.

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Mr. Henn, Q.C., Mr. Brewster, Q.C., and Mr. Torrens M'Cullagh, for the plaintiff.

This assignment of the policy was a nullity, being obtained on a false representation, and the proceeds of the policy now lodged in Court are the property of the plaintiff, who is entitled to the relief sought by his amended bill.

Mr. Smith, Q.C., Mr. Collins, Q.C., and Mr. Joshua Clarke, for the defendant.

There are no grounds to set aside this assignment as void or fraudulent ; there is nothing wrong in any person inducing another to effect an insurance on his own life, and then procuring an assignment of it. The company recognizes this system by their conditions that the policy may be paid to assigns. That being the case, it was open to *Roose* to enter into an agreement that *Scott* should insure

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his life with *Roose's* money, and then assign the policy to him. This is perfectly legitimate, notwithstanding the English statute, as the Irish cases decide that there is no common law principle affecting the question. *British Insurance Company v. Magee(a)*. [RICHARDS, B.—Is it not doing indirectly that which in express terms the Company says cannot be done directly?] The policy the moment it had existence, was the equitable property of *Roose*, and the assignment was merely carrying into effect the previous agreement. The assignment was in blank indeed, but the consideration need not be expressed as a policy of insurance is assignable without consideration; *Fortescue v. Barnett(b)*. This assignment is valid, for mere handing over the policy is sufficient; *Langley v. Brown(c)*. This policy was effected in trust for the defendant, and at his expense; and the money was, as it is proved, actually paid by *Roose's* cashier. Mr. *Scott* agreed to effect the policy on terms with which we have complied. Mere inadequacy of consideration is not a ground upon which a Court of Equity will be willing to set aside purchasers if they are unaccompanied by fraud or misrepresentation; *Murray v. Palmer(d)*. Here we contend there has been none; in as much as for a long time after, though there were many communications between the parties, *Scott* never even hinted that the transaction was unfair. But even should the Court think it necessary to set this assignment aside, it can be only on the terms of giving the defendant both his principal, interest, and costs; *Twisleton v. Griffith(e)*; *Gowland v. De Faria(f)*; *Bowes v. Heaps(g)*.

(a) *Coo. & Al.* 182.(c) *2 Atk.* 200.(e) *1 P. Wms.* 310.(g) *3 Ves. & B.* 117.(b) *3 Myl. & K.* 36.(d) *2 Sch. & Lef.* 474.(f) *17 Ves.* 20.

BRADY, C. B.—In this case the plaintiff claims as executor of *John Scott*, deceased, the money brought into court on a policy of insurance, effected by *J. Scott*, as the property of *John Scott* himself, and alleged by the plaintiff to have been improperly obtained, by an assignment which he is entitled to rescind. It is competent to any person to effect an insurance in Ireland on the life of another ; for the English Act which requires that the insurer should have an interest in the life of the insured, does not extend to this country. It is also competent to any person to take an assignment of such a policy ; but the Court looks to all the circumstances of a case, and where a party seeks the benefit of a transaction which though not against the express provisions of the law, is indirectly against the conditions of the policy of the insurance itself, it is incumbent on him to show that the assignment is one which he is entitled to uphold in this Court. It is said by the defendant that before effecting this policy for his own benefit, it was necessary it should be done in the name of *Scott*. That is a manifest evasion of the third condition annexed to the policy. *Roose* had no interest whatever in the life of *Scott* ; he had no case as against the Insurance Company, should they rely on this condition of the policy ; therefore it appears, on the defendant's own showing, that a transaction was intended to take place which could not stand against the Insurance Company if they should resist it on the grounds of being contrary to the conditions of the policy itself. We therefore must consider, that the policy, when effected, was the property of *Scott*.

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Now see the circumstances of the transaction. *Scott* was clerk to *Roose*, at a small weekly salary. It may be that in consideration of an increase to that salary, *Roose* might

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make it a condition that *Scott* worded this insurance on his life, and that it was intended that if *Roose* went to the Company and made advances of money to them, he might hold for his own benefit this policy so specified. He engages as an inducement to *Scott* to effect the insurance that he would advance *Scott's* salary. This takes place in the end of October, 1835. Having, by his influence over *Scott*, effected the insurance, he obtained this policy by an assignment on the 16th December, 1835, in these words: "I hereby assign all my right, title, interest, property, claim, and demand of, in, and to the within policy of insurance, and all benefit to arise therefrom, for and in consideration of £ " a blank being left for the consideration. This assignment purports to be made, not upon previous contract, but *bonâ fide* for valuable consideration, for some sum paid by the defendant to the assignor, *Scott*. Then we find *Roose*, who had obtained the assignment, breaking through his engagement by suddenly dismissing *Scott* from his situation. It is said indeed that *Scott* had been guilty of misconduct in conducting the defendant's business, but that fact has not been satisfactorily shown. It appears that *Scott* was in the habit of transacting money matters for the defendant, and making disbursements for him, and he brings those disbursements into account. The payment of Mrs. *Tench's* money was brought into account by *Scott*, and the question that arose about it was settled amicably between the parties. That the policy was effected on an arrangement between the parties that *J. Scott* should receive an increase of salary, is manifest from the statement contained in the account accepted by *Roose* himself. It does not appear from that statement that it was contemplated that *Scott* might not remain all his life in the employment of *Roose*.

Taking the transaction as it appears on the face of the statement, *Roose* cannot now say—This was a mere gambling transaction on the life of Mr. *Scott*, and I am to have this sum without regard to the condition on the part of *Scott*, and I am to claim the money now in the hands of the Court, in opposition to the policy of what is the law in England, and by a contrivance prohibited by the terms of the policy, which is now before the Court, against the party in whose name the insurance is effected. I therefore think the demand of *Scott's* executor, the present plaintiff, to have this money now in the hands of the Court, as a stake-holder, allowing all payments made by *Roose* and extra advance of *Scott's* salary, to be maintainable. On these terms I think the plaintiff should have the money lodged in Court by the Insurance Company. As to the question of costs—*Scott's* executor, before the filing of the bill, offered to make to the defendant those allowances to which the Court consider him entitled.—That offer was not attended to. What has been *Roose's* conduct?—It was an important feature in this case to show whether or not there had been a pecuniary consideration for this assignment. It is charged in the bill that this deed (for it is a deed,) was filled up by *Roose* for £50, to give a colour to this assignment; *Roose* in his answer does not give any further statement thereon. It appears to be the truth that no sum was mentioned in the assignment. A more uncandid answer than this cannot be supposed. When *Roose* produced the policy to raise money, and for payment, it is proved incontestably that it bore a consideration of £50 in writing, introduced into the document. There is a plain erasure in that part of the instrument; therefore the Court must give credit to the witnesses upon that point. It appears that, for his own purposes, Mr. *Roose* deals with this

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assignment as he pleases, introducing a consideration when he wants to raise money on the policy, and erasing it when he comes here into court, in order to meet such a case as he would have had to answer here, had he left it inserted. It is therefore my opinion that the true interest in this money is in the plaintiff, and that the plaintiff must have the relief he seeks, and that *Roose* must pay the costs of this suit.

RICHARDS. B.—It appears Mr. *Scott* had power to effect an insurance on his life for his own benefit. *Roose* had no power to effect an insurance on the life of *Scott* with this company. Under these circumstances Mr. *Roose's* case is, that not being entitled, by the express stipulation of the Company to effect an insurance on *Scott's* life, he having no interest therein, he concocted a fraud on the Company, and induced the Company to permit an insurance to be effected on *Scott's* life, for his benefit in fact, though not apparently or so expressed; and he says, that having effected such an object, he is entitled to the benefit of an agreement alleged to be entered into between *J. Scott* and himself. If he in a clear manner established such an agreement to have been entered into; I will not say that the Court would interfere at all, but would leave the parties to their legal rights as against the Insurance Company or each other. But where such an agreement is relied on, for the purpose of turning the person so circumstanced out of court, I would expect very satisfactory proof of it. I think it safest to go by the documents common in the case, as to which no possible controversy can arise. Now, first—we have the policy; annexed to that is a stipulation, in the very teeth of the case the defendant makes, and in respect of which he claims the benefit of the policy.

What was the defendant's case after the death of *Scott*? It is alleged that he had paid £50 for the policy, and got an assignment of it; and not merely is it alleged, but on the faith of such a case, the defendant induced a person to lend him money. Mr. *Ramsay* swears that the defendant had stated to him that he, the defendant, in consideration of £50 had got the assignment. What was his case formerly? if the assignment were genuine, and the £50 not an interpolation, it would have been evidence of what was the agreement between the parties. But now he retreats, and sets up an undefined agreement of a nature which I cannot comprehend. It is said *J. Scott* was to have five shillings a week while employed, but that *Roose* might dismiss him immediately. The Court would not recognize such an agreement without clear proof of it. Now such an arrangement has not been proved. The documents in the cause are against it. Such is not the case that *Roose* always made. We are not prevented from interfering in this case; the money is in court lodged by a consent order, giving the Court an express authority to deal with the money. We are not, I say, to pay that money to the defendant; the plaintiff ought not to be thus put out of Court.

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I say nothing as to the right of the parties here to speculate on gambling policies. How far that is against common law I shall not pronounce^(a), but I think it against public policy that a master should be allowed to insure the life of his dependant servant. I think it not good policy that a person in the situation of this defendant should be permitted to enter into a gambling speculation

(a) See *Wainright v. Bland*; 1 M. & Rob. 481.

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on the life of a worn out man, dependant for his very existence upon the defendant. I express no decided opinion, however, 'on this question. But as to the question of costs, I should be sorry to think the Court coerced by authorities to award costs to a party who has dealt so uncandidly; especially (and it is painful to me to refer to this part of the case,) to a party who has given so incorrect a statement. His statement in his answer to the original bill is perfectly unfounded. Because if this gentleman produced the instrument with the assignment for £50 indorsed, and represented that to be the sum for which that assignment has been obtained, that goes against his statement in his answer. That fact is indeed denied; but when closely interrogated, he says there was a blank left, but that it had subsequently been filled up with pencilling; and we have then two gentlemen of probity saying, that when presented to them, the blank had been filled up with ink. I should be sorry to think that the Court could not deal with the costs according to the demerits of the party. As to the costs of taking the account, that admits of another consideration.

Mr. *Brewster*, Q.C. proposed, that as the items of the Court were so small, it might be settled without going into the office, which was acceded to.

RICHARDS, B.—The sum paid by the defendant may be computed by the Register, and deducted from the costs.

O'HARA v. CREAGH, and Others.

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EQUITY
EXCHEQUER.
Friday,
January 15.

SIMON PIERCE CREAGH being seized in fee of the lands of *Cahirbollig*, in the year 1807, charged by his marriage settlement the same lands with a jointure for *Dora Creagh*, his then intended wife, in case the rents of other premises should be insufficient for that purpose. In 1813, *Simon Pierce Creagh* was arrested under a writ of *ca. sa.* and the plaintiff having paid the debt, *Simon Pierce Creagh* executed a bond to him, on which judgment was entered, as of Hilary Term, 1813, for the principal sum of £123 14s. 8d. In 1814, *Simon Pierce Creagh* died, leaving *Dora* his widow surviving, who became his administratrix. On 8th August, 1816, *Dora Creagh* executed her bond to the plaintiff, as a collateral security (as it was alleged,) for the same debt, on which judgment was entered in Michaelmas Term, 1826, for the principal sum of £149 12s., being the amount of the sum then due (with interest,) on the judgment against *Simon Pierce Creagh*. In 1821, a sum of £50 was paid by *Dora Creagh* on account of this debt. The judgment had been duly revived against *Dora Creagh*, who afterwards intermarried with *James Behan*, and had since died. The defendant, *Pierce Creagh* was the eldest son and heir at law both of *Simon Pierce Creagh* and *Dora Creagh*, and also personal representative of *Simon Pierce Creagh*. This bill was filed in 1837, for an account of the sums alleged to be due to the plaintiff on the two several judgments obtained by him against *Simon Pierce Creagh* and *Dora Creagh*. On the 16th April last, the rule to pass publication was entered; on the 24th April, the *subpœna* to hear judgment was served, returnable on the 28th

The 3 & 4 W. 4, c. 27, s. 40, applies to personal as well as to real estate. When letters or conversations are relied on as taking a case out of the Statute, they should be stated in the bill. A motion to suppress interrogatories as leading, should be made as soon as possible after publication; and therefore such a motion was refused, where, on a previous motion to suppress interrogatories in the cause, the Court had permitted the plaintiffs to re-swear the witnesses to the same interrogatories. The handwriting of a party to a bill of exchange cannot be proved *vidæ voce* at the hearing by a witness who has been examined in the cause.

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May ; on the 29th of May last, the defendant took out copies of the depositions, and in Easter Term the cause was set down for hearing. On the 2d of June, notice was served of a motion to suppress the interrogatories on the ground of their being wrongly entitled, the name of one of the defendants having been omitted in the title, and on the 26th June an order was made on that motion, that the plaintiff might be at liberty to re-swear the witnesses before the officer, to the same interrogatories, the plaintiff undertaking to produce the witnesses within a given time for that purpose. Another motion had been directed to stand over from the last of the eight days after last term, until the hearing of the cause, which was, that the depositions to the 5th and 6th interrogatories should be suppressed, on the ground that those interrogatories were leading. This motion was now to be disposed of.

Mr. Henn, Q.C., Mr. James O'Brien, and Mr. Henry O'Hara, for the plaintiff.

The defence set up on the part of *Pierce Creagh* is, that the bond executed in 1816, by *Dora Creagh*, was a satisfaction of the judgment obtained against *Simon Pierce Creagh*, in 1813 ; and it is relied on as matter of law, that supposing *Dora Creagh* had passed her bond as administratrix, yet that this would not have been a collateral security for the original debt, but a full discharge of it. The Statute 3 & 4 Wm. IV. c. 27, is also relied on as a bar against the plaintiff's suit against the defendant as heir at law of his father ; but there is no defence made exonerating the personal assets of *Simon P. Creagh*. As to the real estate, the bond of *Dora Creagh* being to secure the same debt as that created by the bond of 1813, a payment of

£50 by *Dora Creagh*, on foot of her bond takes the case out of the Statute. Several letters of *Dora Creagh* will be produced, which show that the bond executed by her was passed only as a security. [RICHARDS, B.—You filed a bill in 1837 on a judgment of 1813, without reviving that judgment. I have never seen a suit by a judgment creditor without revival, for twenty-four years.] It is sufficient for us to state what takes us out of the Statute of Limitations; it is not contended that there are any debts against *Dora Creagh*, except as personal representative of her husband, and the bond must have been passed by her as such, for she refers in her letters to the property of her husband being the fund out of which she was to pay the plaintiff's demand. Now we allege that the payment of £50, made in the year 1821, takes the case out of the Statute. There is no defence made on the grounds of non-revival of the judgment; the defendants rely, not on the old Statutes of Limitation, but exclusively on the new Statute; and a payment within twenty years will take the case out of that Statute. It is relied on that the bond by *Dora Creagh* must be taken as a discharge of the debt; but that is not so; for even a bond and warrant passed by the owner of an estate are not a discharge or substitution of a charge on it; *Hardwicke v. Mynd*(a); *Dartnell v. Taylor*(b); *Sanders v. Leslie*(c). The next question is, whether having got this bond from her, payment by her would take the case out of the Statute. It clearly will take the case out of the Statute if the payment is made on account of the same debt. Keeping a collateral judgment revived, entitles the party to proceed upon the other judg-

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(a) 1 Anst. 109.

(b) Lloyd & Goo. temp. Plunket 247.

(c) 2 Ball & B. 599.

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CERAGE. ment; *Mahon v. Davoren*(a); *Warrens v. O'Shea*(b). At all events the plaintiff is entitled to an account of the personal assets.

On the plaintiff's counsel proposing to read the depositions to the 5th and 6th interrogatories, Mr. *Collins*, Q.C. moved that these depositions should be suppressed, as the interrogatories were leading.

BRADY, C.B.—The fifth interrogatory is as follows :—
“ Do you know whether or not the said bond was given as
“ a collateral security,” and so on ; this is clearly leading.

Mr. *Henn*, Q.C.—The defendant cannot make this objection now ; it is too late. [RICHARDS, B.—The defendant must have known on the former motion what these interrogatories were.] Yes ; and that was the time to make their present objection. The order of the 26th June was, that the witnesses should be resworn ; and therefore they were fully aware to what they were to be re-sworn, and there was no new publication in consequence of the order to re-swear the witnesses. The proper time to make this objection was immediately after copies of the depositions were taken out.—*O'Keeffe's Orders*, p. 43. *Stawell v. Stawell*(c) ; *Ball v. Phillipps*(d) ; *Hindes Prac.* 224 ; and as the *Master of the Rolls* said, in the latter case, the party has no right to dole out his objections. But even if leading in part, the interrogatory, it is conceded, is not leading altogether ; and the leading part only should be suppressed. *Hindes Prac.* 398, *Ball v. Phillipps*. The answer to the first

(a) 2 H. & B. 523.

(b) 1 Jebb. & S. 504. 5 L. R., N. S. 77. S. C.

(c) 3 L. R., N. S. 17.

(d) 6 L. R., N. S. 388.

part of the interrogatory incidentally contains an answer to the subsequent part, but it is a good answer to the first part; therefore the motion to suppress the entire depositions is wrong.

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Mr. *Smith*, Q.C.—The order of the 26th June in fact established that there were no interrogatories in this cause. The witnesses were re-sworn on the 7th of November, and four days afterwards our notice of this motion was served, before we had any notice of the title of the interrogatories being amended. Though the first part of the interrogatory is not objectionable, yet the latter part suggests to the witness what answer he shall make to the former; can you therefore say that the second part only should be suppressed? [RICHARDS, B.—You have met that argument successfully; but this is to be considered—that in a case rather critically circumstanced, the party should not be allowed to dole out his objections, and the order is very like a judgment of the Court, that these were the particular interrogatories which should be exhibited to the witnesses. The Court must assume that you had the means of detecting this error, when that order was made; and you should have then apprized the party that you had another objection without putting them to the costs of re-swearing the witnesses.] They should have served us with notice that they intended to re-examine to the same interrogatories. [BRADY, C. B.—They could not have altered those interrogatories, except as to the title.] Then they should have applied to the Court for leave to amend the leading interrogatories. [RICHARDS, B.—They might have fairly assumed that the interrogatories were right.] The plaintiff might have omitted to re-swear his witness, as to the 5th and 6th interrogatories. The rule is not the

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same here as in Chancery, as to the time when such objections should be made.—*Fowler's Exch.* 129.

BRADY, C. B.—Even if there were a doubt, the Court would allow the witnesses to be sworn. Here you have let the parties go on, supposing that they were right; and it would be a strong measure to suppress those interrogatories now.

RICHARDS, B.—Under the circumstances of this case, your objection at this stage of the proceedings should not prevail. We will hear these depositions read, and bear in mind that the witness has been examined on these interrogatories.

It was then proposed to read the depositions to the fifth interrogatory of a person named *Hogan*, who deposed, that at the execution of the bond by *Dora Creagh*, he was informed by her that the bond was executed by her in consideration of the sum then due on the said judgment, to the plaintiff, “and as a further security for the debt due by her late husband.”

Mr. *Smith* objected to this, as evidence against the heir at law. A verbal acknowledgment of part payment of interest is not sufficient to take a case out of 9 G. IV. c. 14, and all the Statutes of Limitation are to be construed together. *Willis v. Newman*(a). These conversations should have put in issue by the pleadings.

RICHARDS, B.—When a case is to be supported by evidence of a conversation, the bill ought to charge that

(a) 3 Y. & Jer. 518.

conversation in order to admit of its being put in issue. Suppose there were other persons present at the time of the alleged conversation, you ought to have charged that conversation specifically, to give an opportunity of cross examining these witnesses, and examining others.

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BRADY, C. B.—In the same way if the party does not set up in his answer a particular fact as a defence, he cannot examine to it, because the record ought to show what the defence was, in order to give an opportunity of controverting it.

A bill of exchange passed in 1821, was offered in evidence to prove a payment on foot of the judgment in 1816; but the hand-writing of the parties not being proved, it was proposed to prove it *vivâ voce*, under a side bar rule, obtained for the purpose, by a witness who had already been examined in the cause; and *Howard's Exchequer* and *Daniel's Ch. Pr.* were cited.

RICHARDS, B.—This only applies to deeds and instruments under seal. If you examine the witness in chief, you cannot then examine him at the hearing. In a case of *Lowe v. Ashe*(a), in this court; it was ruled that the handwriting to letters could not be proved by a side bar rule at the hearing.

It was then proposed to read several letters from *Dora Creagh* to the plaintiff, to show that the bond passed by her was as a collateral security for the earlier debt.

(a) Hil. 1833.

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Mr. *Smith*—The Court should not struggle to get out of the useful Statutes of Limitations, and should not permit the plaintiff to scramble this case out, but that he should state plainly and clearly the facts which except the case from their operation.

BRADY, C. B.—This is not a case calling for any favor. It is a stale demand; sought to be enforced by evidence not in issue in the pleadings. If the letters are relied on as establishing the plaintiff's case, they ought to have been stated in the bill.

Mr. *James O'Brien* and Mr. *Henry O'Hara*, in reply.

BRADY, C. B.—In this case the bill is filed by Mr. *Charles O'Hara*, claiming the amount of two judgments, one against *Simon Pierce Creagh*, the other against *Dora Creagh*. The facts as far as regards the judgment against *Simon Pierce Creagh* are briefly these :—That the judgment was obtained against him in 1813, and the plaintiff does not prove any specific dealing on foot of this judgment is not denied. There has been no payment nor acknowledgment—no dealing since 1813, and therefore with regard to this judgment, the Court is clearly of opinion that the plaintiff has failed to make a case against either the real or the personal estate of *Simon Pierce Creagh*. With regard to the real estate, the defendant relied on the Statute of Limitations, 3 and 4 Wm. IV. c. 27, and nothing has been done to take the case out of it. In the words of that Statute, there has not been “any part of the principal money, or any interest thereon paid, or some acknowledgment of the right given in writing, signed by the person by whom the same is made payable, or his agent, to the

“person entitled thereto, or his agent.” So that as to the real estate of *Simon Pierce Creagh*, the plaintiff’s demand has wholly failed. But it is contended, that though the Statute can be set up as against the demand on his real estate, yet it cannot be set up as against the personal estate; but the Court, on a fair view of the defendant’s answer, is of opinion that he may rely on it. But again, it is said that the Statute has no operation as regards the personal estate. I cannot think so. It would be indeed singular if after, say forty years, the benefit of a judgment might be obtained against personal estate, but not against real estate. It is said that the only Statute applicable to judgments as against personal estate, is the 8th Geo. 1st, and that unless the defendant brings the case within that Statute, he must fail. Suppose, however, the case of a *scire facias* in law by the plaintiff against the executor on the judgment, and that the pleas are payment, and no acknowledgment in writing within the words of the recent Statute. If the plaintiff’s construction prevailed, if an acknowledgment were proved, but no other proceeding, then the first plea under the former Statute would be found for the defendant, and then there would be judgment against the plaintiff on the whole of the case, although there was no payment, but there was an acknowledgment in writing. In one case against the personal representative, he would be entitled to a judgment, when against the real representative he would be barred. On these grounds, I am of opinion that the Statute is not to be construed as restricted to actions against real estate, but as affecting charges on real estate, whether sought to be enforced against either the real or personal representatives(a). But even if this were not so,

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(a) See accordingly *Shepperd v. Duke*, 9 Sim. 567.

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we would adopt the analogy of the old Statute, and say, that by analogy we would not enforce the judgment against personal assets. On these grounds, as against the real and personal representatives of *Simon Pierce Creagh*, the bill must be dismissed with costs. The argument urged for the plaintiff, that entering judgment in 1826, on the bond by *Dora Creagh* would be a "proceeding" on the original judgment, carries the doctrine further than any of the cases cited. In all the former cases there were two securities passed at the same time, and the Court certainly have held, that a proceeding on one is also a proceeding on the other. Here the Court is asked to go much farther; there at best is a collateral security given long after the original one; and the Court is now asked to say, that a payment on the latter, takes the case out of the Statute of Limitations, as to the former. The case does not call for a decision on this point, as there was no evidence of the judgment being collateral; but if it did, I, for one, should feel little difficulty in deciding it in the negative. Therefore, as to the real and personal estate of *Simon Pierce Creagh*, the plaintiff's bill must be dismissed with costs. As to the real and personal estate of *Dora Creagh*, there is little difficulty, and as to that the plaintiff is entitled to an account.

RICHARDS, B.—As far as regards the assets of *Simon Pierce Creagh*, the facts of this case are briefly these:—There was a judgment obtained against him in 1813; and there has not been any proof of payment of principal or interest on that judgment, or of any proceeding on it; there has been no revival of it from 1813 to the present time; there has been no payment or acknowledgment, and therefore upon these short grounds I do not see why the bill should not be dismissed with costs. It is said that a bond

was given in 1816, by his widow ; but that bond is not for the same amount ; there is no evidence which the Court can recognize to show that this bond was given as a collateral security for the demand of 1813. That fact not being proved, it is unnecessary to say what would be the effect of a bond so given by a personal representative, or of a judgment upon it. If, at the expiration of nineteen years, from the rendition of a judgment, a bond be given by another person for the same debt, and in some years after, judgment were entered on that bond. I am not prepared to say that this was a proceeding under the 8 Geo. I, on foot of the former judgment, so as to keep that judgment alive. Well, then—it is said that there was a payment on foot of the latter judgment, and that this was a payment on foot of the former judgment, which therefore takes the case out of both the Statutes of Limitations. But there is no evidence of this fact ; and the manner in which it is sought to support the case, is one which the Court could not favour. Then it is said that the party, in his answer, has relied on the 3 and 4 Wm. IV. c. 27, sec. 40, and not on the former Statute 8 Geo. I, or on length of time, and that he cannot defend himself as to the personalty from the way in which he relies on that Statute. The words of that section are, “ no action, or suit, or other proceeding shall be brought “ to recover any sum of money secured by any mortgage, “ judgment, or lien, or otherwise charged, &c., but within “ twenty years next after a present right to receive the “ same, shall have accrued to some person capable of giving “ a discharge for or release of the same, unless in the mean- “ time some part of the principal money, or some interest “ thereon, shall have been paid, or some acknowledgment “ of the right thereto shall have been given in writing. “ signed by the person by whom the same shall be paya-

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"ble, or his agent, to the person entitled thereto, or his
"agent."

Now, I think it is difficult to cut down the general operation of these words, and divide, as it were, the effect of a judgment or security. The words are general—the Act says, "no action, suit, or other proceeding shall be brought to recover any judgment," &c. The legislature, when the Statute of Wm. IV. passed, knew perfectly well the former state of the law; and it cannot be supposed that they intended to make such a distinction as is now contended for. On this point of the case I concur with the opinion of the Lord Chief Baron, and think on every ground that this bill must be dismissed with costs, as to the assets of *Simon Pierce Creagh*.

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EQUITY
EXCHEQUER.
Saturday,
Jan. 16.

GALWEY v. BARRON.

When counsel has relied upon only some of several grounds of defence, such selection does not amount to a waiver of the rest. Where such had been the case, and an appeal was made to the House of Lords, a petition was allowed for a re-hearing to amend the notes of the decree, without withdrawing the appeal.

THIS bill was filed for the specific execution of a contract for the sale of an estate in the county of *Waterford*. The defendant, in his answer, relied (amongst other grounds of defence,) upon there being no sufficient agreement in writing under the Statute of Frauds. At the hearing of the cause, Mr. *Warren*, the leading counsel for the defendant, was asked by Mr. *Pennefather*, who stated the plaintiff's case, whether he meant to rely on the Statute of Frauds, and he had replied that the other grounds of defence were so substantial that he would not expressly rely on that, at the same time that he did not waive it. Mr. *Pennefather* accordingly applied himself solely to the other grounds of defence, and no observations on the point arising under the Statute of Frauds were made at either side. The

Court had decided the case in favor of the defendant, on the ground only on which it was discussed. The decree was obtained on the 14th of December, 1839, and in the subsequent sessions the plaintiff had appealed to the House of Lords. An application has been made to Baron *Pennefather* that the Register might be directed to enter upon the notes of the decree, that the defendant had waived the defence of the Statute of Frauds; upon which application it was determined that such a conversation did not amount to a waiver. This motion was ordered to stand over until the first day of this term. An application was now made by Mr. *Blackburne*, Q. C., that the plaintiff might be at liberty to enter on the notes of the decree, the reading of certain documents.

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Mr. *Blackburne*—Mr. *Warren* waived the question of the Statute of Frauds, and no remarks having been made on that point, the Court decided the case upon other grounds. In consequence of an intimation that the Statute of Frauds would be relied on in the House of Lords, we applied to the Court for leave to insert in the notes of the decree, that the defendant had waived the defence of the Statute of Frauds. Baron *Pennefather* refused us permission to amend the decree; consequently, unless this motion be granted, we shall be obliged to meet in the House of Lords a case not made here. It is necessary to make this application now, as our case must be printed before the sitting of the House. [RICHARDS, B.—You should have required the Register to take down your objection that they had waived the defence of the Statute. You now seek to enter evidence on the decree which never has been before the Court.]

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Mr. *Warren*, Q. C.—I did not waive the defence of the Statute of Frauds; I said that I considered the other grounds of defence so clear that I did not mean to rely on the Statute; on that occasion the Court pronounced its judgment, and they might have entered what notes of the decree and what evidence they thought fit. The present motion ought to have been made early last term; the time has now elapsed; the notice of this motion was served so late as the 25th of November, 1840.

Mr. *Blackburne*.—The Court has now to decide the difference between the terms in which of defence was waived and not made. Can the Court decide the motion on such a flimsy distinction? We did not care whether the defence were waived or abandoned. Can a man be allowed to avail himself at the bar of the House of Lords of a defence which was suppressed at the hearing? The defence was withdrawn; and it is a gross fraud to attempt to make a defence in an appeal of the House of Lords, which the absence of documents alone allows him to make; which absence was caused by the defendant having formerly withdrawn the defence from the Court. The documents are all proved in the cause, and the first principles of justice require the amendment of the decree sought by the motion, especially when it is opposed by the defendant, or the technical distinction between a waiver and an abandonment.

RICHARDS, B.—The Court^(a) thinks that a party should not be shut out from bringing his case fully and fairly before the House of Lords. At the same time we must have regard to the practice of the Court; and it is not ac-

(a) Foster, B., and Richards, B.

cording to precedent to allow a party to have evidence entered as read at any length of time after the decree was made which had never been opened or stated at the hearing. It behoves the party obtaining a decree to have it properly entered. This decree was of the 14th of November, 1838, and the appeal was brought in the subsequent sessions. It is said that the evidence now sought to be inserted, as read, was not relied on at the hearing, because there had been a waiver of the Statute of Frauds. But the first application to amend the decree has been refused, and the consequence is, that the order made upon it decides, that the defence was not expressly waived. I can understand counsel relying expressly on one ground of defence to say, there are other grounds of defence spread on the pleadings of which I can avail myself, though I consider this sufficient; so that it does not follow that this defence had been absolutely given over. But it is an unreasonable thing that a party at any distance of time should call upon the other side to permit the insertion of evidence not spread upon the notes. Were a party shut out altogether, we might struggle that this might be done; but I would suggest to the other side the propriety of consenting to what we cannot do on this summary application. But as the object of the motion can be obtained circuitously, by withdrawing their appeal and having the cause re-heard, for the purpose of having those documents inserted, I would suggest that those parties should agree to have the documents inserted on the notes of the decree. We will grant liberty to present a petition to have the cause re-heard, for the purpose of having these proofs entered; but it is better, as it may cause unnecessary expense, that we should not impose on the plaintiff the terms of withdrawing his appeal.

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GALWEY
v.
BARRON.

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EXCHEQUER
OF PLEAS.
Monday,
Jan. 18.

MORAN v. ARMSTRONG.

Where A. was indebted to B. and other creditors, and offered a composition to be paid "by cash or good indorsements," to which B. assented, and an indorsement for part of the composition, and cash for the balance were tendered and refused; B. then brings indeb. ass., without any special count, for the whole debt. *Held*, that B. cannot (on proof of the composition) recover the amount of it on the count on an account stated.

THIS was an action of assumpsit on a promissory note; the declaration contained counts on the defendant's acceptance, for goods sold, &c. the common money counts, and on an account stated. Plea, the general issue. The plaintiff proved the defendant's acceptance for £24 11s. 6d., and the delivery of the goods to the amount of £9 5s. 4d., and so far as this evidence went, the plaintiff would be entitled to a verdict for about £34. It appeared, however, on the cross-examination of the plaintiff's witnesses, that in the month of March, 1840, *Andrew Moran*, one of the plaintiff's, with the other creditors of the defendant, had agreed to take a composition on their demands, of 6s. 8d. in the pound, to be paid by one *J. Duff*, as trustee for the creditors, by cash, or good indorsements. It was also proved that £3 in cash, and an indorsement for the residue were tendered, and rejected by the plaintiffs; but it was objected that the plaintiffs were not bound by that composition.

Two questions were left to the jury: namely, the fact of the plaintiff's agreement to the composition, and the tender; the jury found against the plaintiffs on both points, and the Judge directed a verdict for the defendant, with liberty to the plaintiff to apply for a verdict to the amount of the composition. *Keatinge*, Q. C. now moved accordingly that a verdict for the plaintiffs might be entered for the sum of £11 9s. 7d.

The only question now is, whether there being no special count on the agreement, the amount of the composition can be recovered on the money counts, or on the account stated.

The plaintiffs have a right to recover the smaller sum ; and the only course for the defendant to have followed, was, to bring that money into Court. The witness for the plaintiffs, *John Duff*, had promised the plaintiff *A. Moran*, to give him a good indorsement, which he was likely to get for the amount of the composition. This composition was an agreement to pay 6s. 8d. in the pound. If no tender of an indorsement was made, we should be entitled to recover the whole amount ; now here the agreement has not been performed. It is sworn that *Duff* tendered to the plaintiffs an indorsement for £8, and proposed paying the balance of the composition in cash ; but that is not a compliance with the agreement. We were entitled to a good indorsement for £11, and the defendant should show that such was tendered. [FOSTER, B.—Surely cash is as good as the best indorsement, and is not the offer and cash equivalent to the indorsement you claim to be entitled to?] The question reserved is, are we entitled to a verdict for the amount of the composition. The agreement was not to give a sum in cash, but an indorsement, and that agreement would not bind the plaintiff without an indorsement. The plaintiff seeks to get substantially a verdict for the amount of the composition, and is obliged to make this objection, because he can only get that amount by a verdict being entered for him. Even if the defendant had tendered cash for the whole, the plaintiff would nevertheless be entitled to recover ; and if the defendant intended to take advantage of such an agreement, he should have lodged the sum in Court, or pleaded a tender ; *Heathcote v. Crookshanks*(a). In that case the facts were pleaded, and also a tender of the amount of composition ; but the plea was held bad, because the facts of the case did not show a binding final composi-

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(a) 2 T. R. 24.

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tion. When a tender is pleaded the money should be paid into Court; *Reay v. White(a)*; the question was, whether the composition bills were tendered, and the Court ordered the verdict to be reduced to the amount of composition, and that we can on these counts recover at least the sum due on the composition, is evident from *Cooper v. Phillips(b)*.

M'Donagh, for the defendant.—This is the second attempt of these plaintiffs, to perpetrate a gross injustice. They first try the experiment of a trial by jury; upon that trial it appeared that the plaintiffs claimed to recover two sums, one of £24 11s. 6d., the amount of the bill, and the other of £9 5s. 4d., the value of the goods sold; amounting altogether to £33 16s. 10d.; and in that entire claim they persisted throughout. The defence appeared on the cross-examination of Mr. *Duff*, one of the plaintiff's witnesses. That gentleman was selected by the creditors of the defendant, assembled at a meeting in December, 1839, as their trustee, to pay out of the assets of the defendant, a composition of 6s. 8d. in the pound, and the assets were placed under his controul; a good indorsement was to be given for the amount. At this meeting the plaintiffs were not present; therefore *Duff* called on them, and was referred to one of the partners, to whom he mentioned the agreement of the creditors, and on that occasion the plaintiff agreed to accept the same composition as the rest. Within a reasonable time afterwards, the composition was tendered by a bill for £8, and £3 9s. 7d. in cash. This offer was refused on the ground of the plaintiffs not having previously agreed to a composition, and then they say, that being proved out of Court on the declared agreement, they

(a) 1 Cr. & Mee. 748.

(b) 5 Tyr. 166, 3 D. P. C. 196. S.C.

are entitled to substitute another. The question is, was this such an account stated between the plaintiffs and the defendant as, under all the circumstances, entitles the plaintiffs, as of right to a verdict for the amount of the composition. To this motion there are several objections: first, it would be unjust; the plaintiffs denied the contract for a composition, and with that denial they go to the jury; they should not now be allowed to insist upon it. Secondly, the contract was for an indorsement, and the party who made that agreement was agent for the creditors. But they did not show that the time for payment had arrived, and therefore they have no present right to a verdict in money upon an account stated; *Cranley v. Hillary*(a). Thirdly, they have not furnished a bill of particulars, as they should have done, to entitle them to rely on an account stated *Seygus v. Nicholls*(b); *Yeo's Rules* No. 2, p. 99. The plaintiff cannot support his claim to the former debt, where there has been a composition, *Bradley v. Gregory*(c). That case was similar to the present, and Lord *Ellenborough* non-suited the plaintiffs, and held the action could not be maintained. This is a total bar to the plaintiff's claim; accord is no bar without satisfaction; but a party cannot say so to whom a satisfaction has been tendered, as was the case here, according to the terms of the accord. In *Butler v. Rhodes*(d), Lord *Kenyon* directed a verdict for the defendant, because he had parted with his property in consequence of an act of the plaintiff, and the rest of the creditors had executed the composition deed. In this case also this defendant did so; and it is stronger, for it was the trustee for the creditors who entered into this agreement, not the

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(a) 12 M. and S. 120.
(c) 2 Camp. 383.

(b) 3 Jurist. 141.
(d) 1 Esp. 236.

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defendant himself. So in *Boothbury v. Soden*(a), Lord *Ellenborough* non-suited the plaintiff, saying, that his remedy was suspended by an agreement for a composition. In the case of *Heathcote v. Crookshanks*, cited on the other side, there was no giving up of the assets, and no trustee appointed. They rely on *Cooper v. Phillips*; but there no fund was provided for payment of the composition; there was no handing over of the assets of the defendant; and it appeared affirmatively that default was made in payment of the composition. [BRADY, C. B.—There also the composition was payable by the defendant himself.] Here the defendant had no cash, nor did he settle an account; it was the trustee of the creditors who made the agreement. Satisfaction, or a tender is sufficient to defeat such actions as the present; *Wood v. Cheeseman*(b). *Reay v. White* is distinguishable from the present case, for the property was not handed over to a trustee. The cases show that when there is a composition and a fund whereout the creditors are to be paid, they cannot recover from the original debtor on an account stated. This was an express contract with *Duff* the trustee, and he would be liable to the plaintiff, even without a note in writing, as for money had and received, *Robson v. Arundel*(c). An agreement to give a good indorsement is not an account stated and settled *in presenti*. The proper way in Ireland for giving an accord and satisfaction in evidence is under the general issue.

Brereton, in reply.—The abstract justice of this case lies with the plaintiff, a trader who sold and delivered his goods. All the cases cited by Mr. *M'Donagh*, show that a

(a) 3 Camp. 175.

(b) 12 B. and Ad. 328.

(c) 1 St. Rep. 372.

composition is in the nature of an accord and satisfaction to the whole demand; as to the whole demand there has been a change of liability, but there is a new demand on the composition which we can recover on an account stated *Reay v. White* is a direct authority on our side, and shows that a tender in cash is of no avail without a subsequent lodgment in Court. They should have lodged the cash in Court, and pleaded payment as to part, and a tender as to the rest. *Cooper v. Phillips* would establish this point, that when the composition is payable by the defendant himself, it may be recovered in this form of action. [BRADY, C. B.—The tender here is relied on as a performance of the conditions of the substituted agreement to be performed by the trustee. RICHARDS, B.—The tender here is relied on as the consummation of the substituted agreement.] *Duff* was here a mere agent, and it cannot be contended that an action for the amount of the composition would lie against him.

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BRADY, C. B.—In this case the Court is of opinion the verdict must stand. That verdict depends upon the facts found by the jury, that there was a valid composition agreed to by the plaintiff and defendant; and that as to the original demand there was no cause of action. It is, however, contended, that upon the count on an account stated the plaintiff has a right to recover the sum secured by this composition. It was opened by the counsel at the trial, that he was so entitled; but all through the trial it was insisted that he should recover his whole demand until the verdict was about to be given, and then he turned round and claimed the composition. It appeared to me unjust that he should thus take chance of a verdict for his whole demand; and when defeated in

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that, should then elect to say, I will take a verdict for the amount of the composition. If this case were similar to *Cooper v. Phillips*, where it appeared there was an agreement between the plaintiff and defendant, unquestionably that case would decide that a plea of a composition was no answer to the whole demand. But here the agreement is not for a composition in money, but for a new security, by the delivery of an indorsement of a note, and there was found by the jury a substituted agreement, a new contract (as in *Good v. Cheeseman*,) capable of being enforced against the parties to it. It appeared there was a tender of £3, and unquestionably if that were a question whether a tender would do without lodging the amount in Court, we should decide it would not. Here it is urged the tender of the £3 amounts to an account stated. I do not think it does, for it would in effect come to this, that where there was a composition entered into to be paid partly by notes, partly by cash, tender of part in cash, although absolutely refused, is an account stated. I can find no authority which goes to this extent; on the contrary, an offer refused is not evidence of an account stated, unless that offer be accompanied with an acknowledgment of a debt. I do not think therefore that the verdict should be disturbed.

FOSTER, B. concurred fully in the views taken by the Lord Chief Baron.

RICHARDS, B.—The facts of this case appear from the certificate of counsel, and the notes of the Judge to be, that the defendant was originally liable to pay the plaintiff a certain sum, but having become embarrassed in his circumstances, his creditors, among whom was the present

plaintiff, agreed to accept a composition. By that agreement the defendant was to place his property in the hands of Mr. *Duff*, and the plaintiff was not to get cash, but an indorsement, in satisfaction of his demand. He was offered an indorsement for a portion of his demand, and cash for the balance, but he rejected the offer, not objecting that he was not offered an indorsement for the whole, but insisting that there was no effectual composition at all to bind him. After that refusal he brings his action. The two questions left to the jury were found in favour of the defendant, and their verdict established that the plaintiff was bound by the composition, and that it had been endeavoured to perform the agreement. There are therefore two questions here: the first is, whether the offer of £3 is evidence of an account stated. I do not think it is. The next is, whether the plaintiff is entitled to come into a court of law, and recover this demand in *indebitatus assumpsit*. There was a contract to pay in a sufficient manner, and it was by the plaintiff's own default that his demand was not satisfied, for the defendant performed all that was required to be effected by him. The verdict therefore must stand. As, however, the plaintiff is certainly entitled to £11 odd, and this offer was made by the defendant's counsel; it is only fair that that sum should be deducted from the taxed costs payable to the defendant(a).

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(a) See *Hely v. Hicks*. 3 Ir. Law. Rep. 92.

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January 19.

MASSY. v. GUBBINS.

Where A had been in possession of the lands and bog of G, as devisee in fee, and on disputes arising concerning the will by which he claimed, conveyed the lands and bog to B, and took back a lease for lives renewable for ever, of the house and demesne of G, together with the liberty of the commonage of the bog of G. "in as full, ample and beneficial a manner as the said demised premises had lately been enjoyed" by him. *Held*, such grant did not authorize any right cutting of turf for sale.

TRESPASS on the case for disturbance of a right of common of turbary, and also of a right of common of pasture.

The declaration contained seven counts, the first five of which were for the disturbance of a common of pasture, and the sixth and seventh, for the disturbance of a common of turbary. The two last counts were in the following form:—

" And whereas also the plaintiff, before, and at the time
 " of the committing of the grievances hereinafter next
 " mentioned, was, and from thence hitherto hath been, and
 " still is lawfully possessed of a certain messuage, with the
 " appurtenances, to wit, at *Griston*, in the county afore-
 " said, and he, the said plaintiff, during all the time last
 " aforesaid, of right ought to have had, and still of right
 " ought to have a common of turbary, in and upon a
 " certain bog, called the bog of *Griston*, in the county afore-
 " said, and to take, dig, and cut turf and peat, in and
 " upon the said bog for necessary fuel to be consumed,
 " burned, and spent in, and upon his said messuage, with
 " the appurtenances, every year, and at all times of the
 " year, as occasion required; yet the said defendant, well
 " knowing the premises last aforesaid, but contriving to
 " injure the said plaintiff in this behalf, whilst he was so
 " possessed of the said messuage, to wit, on the same day
 " and year last aforesaid, and on divers days and times
 " between that day and the day of exhibiting this bill,
 " wrongfully and unjustly, hindered and prevented the

" said plaintiff from entering upon the said bog, to take, 1840.
 " dig, and cut turf thereon for necessary fuel, to be con- MASSY
 " sumed, burnt and spent in and upon his said messuage, v.
 " with the appurtenances, and then and there obstructed GUBBINS.
 " and disturbed the plaintiff in the use and enjoyment
 " of his said common of turbary there; so that the said
 " plaintiff, on the several days, and times, and during
 " all the said time last aforesaid, could not have, or enjoy
 " the same, in as large, ample, and beneficial a manner
 " as he otherwise might and would have enjoyed the
 " same, to wit, at *Griston* aforesaid, in the county
 " aforesaid.

" And whereas the plaintiff, before and at the time of
 " the committing of the grievances hereinafter next
 " mentioned, and from thence hitherto, of right ought to
 " have had, and still of right ought to have common of
 " turbary in and upon a certain bog in the county aforesaid,
 " called the bog of *Griston*, and to cut, dig, and take peat
 " or turf in, and upon, and from the said bog, as he should
 " think fit, for his own use and for sale, to wit, at *Griston*
 " aforesaid, in the county aforesaid, yet the defendant well
 " knowing the premises last aforesaid, but contriving to
 " injure the said plaintiff in this behalf, to wit, on the day
 " and year last aforesaid, and on divers days and times
 " between that day and the day of exhibiting this bill,
 " wrongfully and unjustly entered upon the said bog,
 " and then and there hindered and prevented the said
 " plaintiff from taking, digging, and cutting turf on the
 " said bog for his own use and for sale; and also then and
 " there kept out and excluded the said plaintiff from the
 " said bog, and then and there obstructed and disturbed
 " the said plaintiff in the use and enjoyment of his said

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 MASSY "said plaintiff not only lost and was deprived of large
 v. "gains and profits which otherwise would have made
 GUBBINS. "from said turf and fuel, by sale and consumption thereof,
 "to wit, at *Griston* aforesaid, in the county aforesaid, to
 "the damage of the said plaintiff of £1,000, whereby he
 "is the less able," &c.

To this declaration, the defendant pleaded, first, the general issue; secondly, the statute of limitations; and thirdly, that the *locus in quo* was the close of the defendant. The plaintiff by his replication joined issue on the first plea, traversed the second plea, and demurred generally to the third plea. The defendant, by his rejoinder, joined issue on the second plea, and joined in demurrer to the third plea.

At the trial at the county of Limerick Assizes, in the Summer of 1839, before Mr. Serjeant *Greene*, it appeared, that *Charles Massy*, the grandfather of the plaintiff, on the 28th December, 1795, made a will, devising all his real and personal estate, of what nature and kind soever, to *George Massy* and *Nathaniel William Massy*, and their heirs for ever. On the 1st June, 1807, he made another will, revoking the above, and devised and bequeathed to his son *Frederick Massy*, the father of the plaintiff, and his heirs and assigns, all his estate, real and personal, subject to certain charges. Soon after the execution of the will of 1807, *Charles Massy* died. Litigation having arisen about these wills, a compromise was entered into between *Nathaniel William Massy* and *Frederick Massy*, by an agreement, dated 17th October, 1802, by which it was agreed, that *Frederick Massy* should release his claims

under the will of 1807, and that *Nathaniel William Massy* should demise the house and demesne of *Griston* to *Frederick Massy*, for lives renewable for ever, at two guineas an acre, and should secure the said *Frederick Massy* an annuity of £100 a year, to be issuing out of the said lands, during his life, in pursuance of which, by an indenture of the 5th of Sept. 1803, made between the said *Frederick Massy* and *Nathaniel William Massy*, *Frederick Massy*, released to *Nathaniel William Massy* all the said lands, save as to the lease of the house and demesne of *Griston*, the annuity of £100, and another annuity of £50, chargeable thereon. On the same day, a lease was made between the same parties, whereby *Nathaniel William Massy* "granted, bargained, sold, released, and confirmed unto the said *Frederick Massy*, his heirs and assigns, All that and those, the house, offices, gardens, orchards, and demesne of *Griston*, containing 67 acres," bounded as therein described, "together with liberty of the commonage of the bog of *Griston*, in as large and ample a manner, as the said demised premises had been lately occupied by the said *Frederick Massy*, to hold the said demised premises during the term of three lives (with a covenant for perpetual renewal), yielding and paying, &c. for each and every acre in the said demised premises, *except the bog*, the yearly rent of £2 5s. 6d. sterling per acre." It appeared also, that at the time of the execution of this lease, and for about three years previously, *Frederick Massy* had been in possession of the said lands and commonage, and had exercised rights of ownership there without any molestation. In February, 1819, the interest of *Nathaniel William Massy* in the said lands was sold, under a decree of the Court of Chancery, to the defendant *Gubbins*. In the year 1820 *Gubbins* took possession of the lands so pur-

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chased, and of the bog. In February, 1836, *Frederick Massy* died, leaving the plaintiff, his only son and heir-at-law. *Gubbins* had prevented *Massy*, the present plaintiff, from cutting turf for sale, for which injury the action was brought. The demised bog was proved to be worth £300 a year. The jury found a verdict for the plaintiff in £5 damages for the disturbance of the right of turbary, on the assumption, that an unlimited right of turbary passed by the lease; the learned judge having reserved leave to move to have a nonsuit or verdict entered for the defendant, if (among other grounds) the court should be of opinion, that no such unlimited right passed by the lease. *Cooper*, Q. C., now moved accordingly.

Collins, Q. C., contended, that he, being in possession of the verdict, had a right to commence; this was resisted by *Cooper*. [FOSTER, B.—As long as I have been a member of the Court, it has studiously abstained from pronouncing any rule on this subject. BRADY, C. B.—The good sense of the thing is, that the party objecting to the verdict should commence.] *Cooper*—The claim stated in the seventh count is, in effect, a claim of unlimited common of turbary in gross in the bog of *Griston*. Common is of four kinds, appendant, appurtenant, because of vicinage, and in gross. Common in gross is annexed to a man's person; I have found no claim of common in gross for turbary, as it is a contradiction in terms; since turbary is turf to be used on a messuage, and common in gross, must be claimed by deed or by prescription, and has no relation to land. To support that right, they produced a lease of 1803, by which *Nathaniel William Massy* demised the premises in question (then setting out the bounds), “together with liberty of the

“commonage of the bog of *Griston*, in as large and ample
 “a manner as the same had lately been occupied by the said
 “*Frederick Massy*.” The plaintiff insisted, that these words let in evidence of the manner in which *Frederick Massy* enjoyed the premises : if these words were not used, the question would be for the Court ; but being used there, it was a question of law and fact, and therefore should go to the jury. The construction of a deed is for the Court, not for the jury, and the acts of the parties are not to be considered. Now, it is observable, that the words of this lease are not, “in as large, ample, and beneficial a manner as the lands were *enjoyed* ;” but, “in as large, ample, and beneficial a manner, as the same were *lately occupied*.” These words are, indeed, generally words of course, inserted by ignorant conveyancers without having any definite meaning ; but if they have any meaning, it must be “in as ample a manner as the premises were occupied by the lessee, *Frederick Massy*,” and must be understood as defining the quantity of land, and not the extent of his right. [FOSTER, B.—The word occupied might have one signification as relating to the land, and another as relating to the bog.] The demised premises are, “the house, offices, gardens, orchards and “demesne of *Griston* bounded,” and the bounds are then specified, “together with the liberty of the commonage of “the bog of *Griston*.” This easement forms no part of the demised premises. Then the *reddendum* clearly shows, that the ceasement was not part of the thing demised, for the rent is thus reserved, “yielding and paying for each and every acre in the said demised premises *except the bog*. [BRADY, C. B.—That shows the bog was part of the demised premises.] The tenant had no right to occupy the bog ; he might have cut turf there for his own use, and only for

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his own use. The jury have found no damages, but for the disturbance of the right of cutting turf for sale; not for the plaintiff's own use. But even an express demise of the bog, would not have given an unlimited right of cutting turf for sale—*Jack v. Creed*(a). In that case the Judge told the jury the construction of the deed, and here the learned Judge now refers it to the Court. That case was ultimately decided on other grounds, but the opinion of the Judge was confirmed by the Court, was in his favour. The number of acres is undefined in this case; and the words "in as large and ample a manner," refer to the extent of the land, not to the mode of enjoyment. [FOSTER, B.—In construing deeds, we are not to shut our eyes to the question, whether the parties act consistently with common sense. It would be reasonable, that the tenant should have a right of fuel, but not to cut away the whole bog, proved to be worth £300 a year.] Common of turbary can only be appendant to a house, and cannot extend to a right to cut turf for sale—3 Cruise Dig. tit. 1. *Burrows v. Hayes*(b) is a direct authority in my favour.

(a) 2 Hud. & B. 128.

(b) Mr. Cooper cited this case from a MS., with which he has obligingly favoured the reporter. It is as follows:—*Monday, February 3d, 1834.*—Serjeant *Pennefather* moved to make absolute the conditional order of the 6th of Nov. 1833, for an injunction in the nature of a writ of estrepement to stop the defendant's cutting turf for sale. *J. Peray* was seized in fee of the premises in question, and 6th of June, 1810, demised them to the defendants, "together with the bog and commonage thereunto belonging, in as large and ample a manner as *Peray* held the same." The lease reserved liberty for *Peray*, his heirs, &c., to cut turf and to raise gravel; also a covenant by him to permit the lessee to raise bog oak and to burn the moor, provided that they should manure and gravel the same. But the lease did not contain any permission for them to cut turf for sale. The premises demised consisted of 70 acres of arable land besides the bog, the term was three lives, the rent 80 guineas per annum. The defendants had cut turf for sale. It was sworn that unless the tenants had the privilege of cutting turf, the premises were not worth the rent. The

Henr, Q. C., and *Collins*, Q. C., for the plaintiff.—This is not an ordinary lease; it was executed in 1803, in order to effect a compromise of a suit then pending, concerning the validity of the two wills of *Charles Massy*. The right we claim over the bog is, perhaps as valuable as the land itself. We claim this right as a common in gross, and such a right in gross is maintainable. The earliest case of common in the books is one of common of turbary in gross(a), and such a right was there recognized; it may be granted like a common of pasture for a pecuniary consideration(b); common, because of vicinage is a common in gross, not being appendant to land(c). This is an authority to show that a common of turbary in gross may be granted

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plaintiff purchased *Peray's* interest in the lands a few years before this time. During the period that *Peray* was landlord, &c. the tenants had cut turf for sale. *Bennett* with *Pennefather*, cited *Lord Courtown v. Underwood*. *J. D. Jackson* and *Costello*, contra, cited *Anon.* 1 Hog. 147. Co. Litt. 54. *Clavering v. Clavering*, 2 P. Wms 388. *Barry v. Barry*, 1 Jac. and Walker, 657. Upon the case in *Hogan* being cited, *Pennefather*, B., observed, "That observation applies to the case where there is a demise of bog only. Wherever there is a demise of bog with land, and it is intended that the parties shall have a right to cut turf for sale, it ought to be very specifically mentioned, for it is against common right. A demise of bog and commonage with land will not *per se* give the lessee a right to cut turf for sale.

The *Chief Baron* asked—"Bog is a description of land in Ireland, just as much as arable land—but would a demise of arable land authorize the lessee to commit waste?" *Pennefather*, B., gave judgment—"The Court thinks this to be a very plain case for an injunction, and that the authority of the Master of the Rolls, so far as what he has said in the case in *Hogan*, is quite conclusive against the lessee; for it is, that when there is a demise of bog alone, as bog, then the lessee may cut for sale, but that in every other case, unless there are very clear words in the demise, the tenant has no right to cut turf for sale. The words must be very clear and explicit. Here there are no such words. If the landlord had lain by, and suffered valuable expenditure to be laid out on the property, with the view of cutting the turf for sale, there might be a case to prevent the landlord obtaining an injunction, but there is no such case here. It is the ordinary case, and the rule must be made absolute with costs.

(a) Lib. Ass. 7 Ed. 3 pl. 11, 8. (b) Year Book, Hen. 6. 1 Roll.

(c) Co. Litt. 122, a.

Ab. 402.

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MASSY

v.

GURBINS.

which will confer a right to cut turf in an unlimited manner; it is classed with common of piscary, or of minerals, which does not limit the quantity of fish or of ore. A right of this sort may pass in gross(a), *Weekly v. Wildman*(b); *Stamford v. Burgess*(c). There also are many ancient authorities, 36 Ass. pl. 3; 25 Ass. pl. 8. [FOSTER, B.—You assume that one party intended to make to the others a great present out of the bog, yet he charges a considerable rent out of the land.] By the charge of the annuity, £100 a year is remitted out of the rent of the land; the soil of the bog is not demised, but the commonage; and the plaintiff claims the right of commonage *sans stint*. *Frederick Massy*, before the lease claimed the lands as a devisee and owner, and cut turf for sale as much as he could; now the deed must be construed according to the obvious intent of the parties. That in the ordinary case of landlord and tenant, the tenant may or may not cut turf for sale, is irrelevant; for here, if *Frederick Massy*, after the death of his father, and before the making of the lease, cut turf for sale, that privilege was conferred on the defendant; every deed must be construed most strongly against the granter. *Shep. Touch* 100; *Lord Cardigan v. Armittage*(d). The Judge below must have gone into evidence to ascertain what the intent of the parties was, in all cases of deeds, containing a reference to a previous user, a party may go into evidence to show the extent of that user. [RICHARDS, B.—No doubt about that.] This is an independent grant; first, of a house and demesne, with the bounds set out; secondly, of the bog, in as large and ample a manner as the demised premises have been lately occupied by *Frederick Massy*. [RICHARDS, B.—If the words “am-

(a) Co. Litt. 4, 6.

(c) Shep. Ab. 381.

(b) 1 Ld. Ray. 405.

(d) 2 B. & C. 197.

ple manner," referred to the user of the bog, it is so; that is your difficulty.] Observe in what part of the sentence these words occur; it is clear the parties by the terms of the *reddendum* treat the liberty of commonage as demised, the words being, "for each and every acre in the said demised premises, excepting the bog;" the lessee, it is plain, is to have the land and privilege of the bog, but the rent is to be paid for the land. On the whole instrument, the words refer as well to the privilege of turbary as to the enjoyment of the house and demesne of *Griston*, A grant of a house, &c. "in as full and ample a manner as before enjoyed," or a grant of any easement or right therewith used and enjoyed," are words as adequate to pass the subject as direct words; *Bradshaw v. Eyre*(a); *Worledge v. Kingswall*(b); *Grimes v. Peacock*(c); *Harding v. Wilson*(d); *Plant v. James*(e), and many other cases(f). The case in *Hudson and Brooke* is no authority against us; it was a case of ejectment by a remainder man against the lessee of a tenant for life, under a power, on the ground, principally of a clause of surrender being introduced into the lease, and therefore it became unimportant to him how the other grounds were decided.

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 v.
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Molencorth in reply.—Admitting that a right in gross of cutting turf may exist, it has not been granted in this case; but the cases cited at farthest only show the legal possibility that such a right may exist, and the Court should be slow to put such a construction on these words; the right claimed differs from that of commonage for cattle, being at-

(a) Cro. Eliz. 570.

(c) Buls. 17.

(e) 2 Nev. & M. 517.

(b) Ib. 794.

(d) 2 B & C. 96.

(f) See Gale & Wheatley. L. Easements, p. 48.

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tended with the destruction of the subject matter; but the words "liberty of commonage" must mean a right exercisable by several persons together. Such is the meaning of the word "common," both in legal and in ordinary signification. *Johnson's Dictionary*, *Cunningham's Law Dict*, "Common;" *Woolrych on Commons*. The word "occupy" also is inconsistent with the right claimed. A grant of a right of common in the way in which it has been customarily used, must be taken to mean such a right of common as may by law exist; *Benson v. Chester*(a). Moreover, common in gross *sans nombre* cannot be aliened or devised. *Woolrych Com.* 129. What is there said of a common of pasture in gross, is exactly applicable to a common of turbary for sale; therefore this inconvenience would follow—that the right of common must remain in the heir of the grantee, while the land itself might be aliened or devised by him.

BRADY, C. B.—In this case we are all of opinion that the plaintiff has failed to show an unlimited grant of a right such as he claims, of digging and cutting turf for sale, as he states it in the seventh count of his declaration. To support that right at the trial, he produced a lease, dated in 1803, conveying the right by words which, it is almost conceded by the plaintiff's counsel, are insufficient in an ordinary case to convey such a right. That lease appears to be made between lessor and lessee in the ordinary manner, and it demises certain lands therein described, "together with the liberty of common of turbary in the bog of *Griston*, in as full and ample a manner as the same was "occupied by *Frederick Massy*." On these latter words the plaintiff founds his claim. It is indeed competent for any

(a) 8 T. R. 396.

one seized in fee, to grant to another the right to cut and carry away the produce or the surface of the land. Whether such a grant can properly be called common is another question : but no one can deny that such a grant may exist. The question is, has that grant been made here? The lease is clearly in the ordinary form, by which one man demises to another ; the lessor demises the lands therein described, " together with liberty of the common " of turbary in the bog of *Griston*, in as large and ample a " manner as *Frederick Massy* occupied the said demised " premises." It appears in evidence that *Frederick Massy* had set up a claim to this property, and had been in possession of these lands for a few years before the lease was made, during which he had dealt with them, as it is said, in the character of an owner ; and it is contended, that when his character was changed, and *Frederick Massy* became tenant instead of landlord, he was still to remain exercising the rights of ownership, as if this lease had never been executed. That is not a natural arrangement, or such an one as the parties could have intended. It has been contended that by this lease there was a grant in gross of an unlimited right of turbary for sale, and other purposes ; but had that been the intention of the parties, they might have used words more intellegible than they have used here, for these are the very ordinary words usual in leases granting a limited common of turbary. The two things are granted together ; there is no separate demise ; and the words refer to a joint demise, and a common occupation of the two. The land is let at what appears to be a fair reasonable rent ; there is nothing to show that a gift was intended ; and it appears in evidence that a common of turbary passed by the deed. By that deed the tenant takes as lessee, not as owner ; and the " liberty of common " must be the

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 v.
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1840. tenant's right to common; not such as he had before.
 MASSY v. GUBBINS. Upon the whole of the case, we are of opinion that a nonsuit should be entered; but as the question is a grave one, and considerable property is involved in the result, if the parties desire that our opinion, if wrong, should be reviewed by another tribunal, the Court would wish to afford every facility for putting this case on record.

It was ultimately arranged that a new trial should be granted.

1841. HAMILTON v. SMITH, Executrix of PEARSON,
 Jan. 19. Deceased.

Service of the protest is sufficient notice to the indorser of the dishonour of a promissory note.

ASSUMPSIT on a promissory note of the 26th November, 1831, payable at six months, drawn by *Samuel Hartney*, payable to *John Pearson*, and indorsed by him to the plaintiff. The bill was dishonoured when due, and was duly protested. *Pearson* died in November, 1835; and the declaration in this suit was filed the 25th of May, 1838, against the defendant, as his administratrix. Plea, the general issue. At the trial before the Chief Baron, it appeared in evidence, that the note was lodged in *Latouches'* bank for collection; the bankers gave it to their notary in the usual course, and a memorandum of protest was made on the 29th April, 1832. A witness for the plaintiff swore, that he served a "protest" at *Pearson's* house, which was partly in writing, and partly printed, but could not say what its contents were. The question was, whether this protest by the bankers' collector, was sufficient evidence of dishonour. The jury found a verdict

for the plaintiff, the point being saved by the learned Chief Baron.

1841.
HAMILTON
v.
SMITH.

Napier now moved to set aside the verdict. This declaration contains an express allegation, that *Pearson*, in his life-time, and the defendant, since his decease, had notice of the dishonour of the note. Under the allegation of notice, an actual notice must be proved; *Burgh v. Legge*(a), *Esdaile v. Sowerby*(b). I admit, that the protest is a very formal notification, but that is only one ingredient in the notice of dishonour. The cases cited show, that notice means *notice*, not mere knowledge. This notice does not mention who the holder was. In this case nothing was left with the indorser but a notary's protest(c). Now, a protest is not necessary on an inland bill, but only to recover certain charges: it is required by the custom of merchants only on a foreign bill of exchange; notice of dishonour is required by the common law on an inland bill, but a protest on such is only by statute; *Brough v. Perkins*(d). Where a protest is necessary, there must also be a notice of dishonour, which shows they are distinct things: the protest is merely a notification. It is very desirable, that courts of law

(a) 5 Mee. & W. 418.

(b) 11 East. 114.

(c) The following is the form of a protest by a public notary on a bill or note. On the day of one thousand eight hundred and forty-one, I *A. B.* of the firm of of the city of *Dublin*, public notary, by royal authority admitted and sworn, dwelling in the city of *Dublin*, did present the original "*bill*" or "*note*" a true copy whereof is within written for *payment*, at No. street, in the city of *Dublin*, to a man aged upwards of years, who returned for answer that there were no assets. Wherefore, I, the said notary, do solemnly protest against the said drawer of said "*bill*" or "*note*," and all others therein concerned, for all change, exchange, and rechange, and all losses, costs, interests and damages suffered and to be suffered for want of said "*payment*." This done in our office, in the day and year aforesaid, which I attest. Signed *A. B.* public notary.

(d) 2 Ld. Ray. 992; 6 Mod. 81 S. C.

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v.
SMITH.

should not make trivial distinctions: if a protest could be held notice of dishonour, that point would long since have been settled. The Court of Common Pleas follows the decision in *Solarte v. Palmer*(a), which has also been followed by *Burton, J.* in *Brushe v. Hayes*(b). There is no instance of a protest on an inland bill being given in evidence; *Windle v. Andrews*(c). The protest does not show who is the holder of the bill, or that the party on whom it is served, is looked to for payment; *Tindall v. Brown*(d). [BRADY, C. B.—The declaration only avers, that the note was not paid, whereof the defendant had notice.] The judgment of *Parke, J.*, in the last cited case, shows what that notice should be. This document only shows, that the bill has not been paid; but the requisites of a notice of dishonour are established by the decision of the House of Lords in *Solarte v. Palmer*, and by the judgment in *Brush v. Hayes*. It should convey both these ingredients; namely, that the party is liable, and the bill unpaid; *Hedger v. Stephenson*(e). [BRADY, C. B.—In *Solarte v. Palmer*, the House of Lords did not decide the principle laid down here.] But the principle of that case regulates this: that principle has been recognized in *Strange v. Price*(f), and in *Messenger v. Southey*(g); *Bayley on Bills*, 5 Ed. 256. A protest is never given as notice of dishonour of a bill of exchange. [BRADY, C. B. In Dublin the course is to send the protest from one party to the other. RICHARDS, B.—I have often seen protests given as notice of dishonour, and not objected to]. This bill was lodged for collection, and the protest forwarded by a notary. *Cooke v. French*(g) differs from this

(a) 1 Bing. N. C. 194. 1 Scott. 1. (b) 1 Jebb. & S. 668.

(c) 2 B. & A. 696.

(d) 1 T. R. 167.

(e) 2 Mee. & W. 799.

(f) 2 Per. & D. 281.

(g) Scott, N. R. 180.

(h) 10 Ad. & E. 131.

case, for there was an intimation from the holder ; here the holder's name does not appear on the protest.

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HAMILTON
v
SMITH.

Brewster, Q. C. contra.—Such a notice as is required by the counsel for the defendant, would require to be drawn by a professional man. I never knew notice proved, but by service of the protest. This point is settled by 9 *Geo. IV.* c. 24, s. 4. [RICHARDS, B.—That would appear, as if the legislature treated the service of the protest as notice]. In *Boulton v. Welch*(a) the law was carried too far ; but even in that case (since overruled by the Exchequer and Queen's Bench), C. J. *Tindal* expressly says, that a protest is sufficient evidence, though it does not appear that it was presented. The test to try the sufficiency of the notice, is to compare it with the form of the protest. That protest states clearly presentment and dishonour. In England a promissory note need not be protested, but here a protest must be served, as it is required by that statute. (He referred to *Lewis v. Gompertz*(b), and the Court called on Mr. *Whiteside*).

Whiteside in reply.—This is a question of strict law, and should be so held. The notice of dishonour should inform the party either expressly, or by necessary implication ; so in it was held *Messenger v. Southey*, and *Strange v. Price*. The statute only says, that after notice to fix the party with the costs of the protest, a protest should be served. In *Boulton v. Welch* the notice was bad ; and in *Brush v. Hayes*, there was a waiver of the notice, but *Burton, J.*, intimates his opinion, that he must be bound by *Solarte v. Palmer*. In case of a foreign bill,

(a) 3 Bing. N. C. 688.

(b) 6 Mees. & W. 399.

1841.
HAMILTON
v.
SMITH.

there must be a protest, and there must be notice. *Cooke v. French* is in a note, and is contrary to what is said in *Strange v. Price*.

BRADY, C. B.—In this case, the Court are of opinion, that there has been sufficient notice given of the dishonour of the bill. It is important to see what it is that the plaintiff has alleged is his declaration; a party is bound to prove what he has alleged in his pleading, and he is not bound to prove more. Here he states, that “the said *Samuel Hartney* did not, nor did any other person, pay the said note, although the same was presented on the day when it became due, of all which the said *John Pearson* then and there, in his life time, and the defendant, since his death, had due notice.” Accordingly, the cases show, that due notice must be given, and *Solarte v. Palmer* has established, that such a notice must contain a substantial averment that presentment for payment has been made, and that payment has been refused. But we are now asked to carry the law so far as to say, that a notice is bad, unless it contain what is not stated in the declaration. *Cooke v. French* is an express authority the other way: in that case the Court decided, that a notice of dishonour is good, although omitting to state that the party sought to be charged was required to pay the demand. I am of opinion, that serving the protest as was done here, was sufficient notice of dishonour, even without reference to the act of parliament; and that notice of the dishonour of a bill need not be given, when the bill is formally protested, and the protest is served.

FOSTER, B.—I concur in this opinion, for the reason stated by the Lord Chief Baron.

RICHARDS, B.—There may be good reason for holding, that the facts of presentment and dishonour should be stated in the notice to an indorser, which would make him liable to the holder, when a bill is dishonoured. But I think it would be too much to require what is desired at the bar, namely, that in addition to those facts, the notice should state something, minacious, that the party is required to pay the bill. I think the Act of Parliament referred to, is a distinct legislative recognition of what had been theretofore the usual practice, namely, that service of the protest was sufficient notice of the dishonour.

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HAMILTON
v.
SMITH.

Rule refused.

Pamfather, B., was absent.

FERRIER and Others, v. PURCELL.

O'LEARY moved that the proceedings on the bail bond given in this case might be stayed, and the bail bond be delivered up to be cancelled on the defendant's entering a common appearance, and undertaking to pay the costs of the proceedings on the bail bond. The writ upon which the defendant had been arrested was issued on the 28th July, 1840, returnable on the 31st October; on the 26th August, the defendant gave bail to the writ, but he did not give bail to the action. The plaintiff took an assignment of the bail bond from the Sheriff. The writ against the bail was returnable on the 9th January, 1841.

1841.
EXCHEQUER
OF PLEAS.
Wednesday,
Jan. 20.
Where a defendant gave bail to a writ but did not give bail to the action, and the plaintiff took an assignment of the bail bond from the sheriff and proceeded against the bail by a writ returnable since 1st Nov. 1840, proceedings on the bail bond were stayed, and the bail bond ordered to be cancelled under 3 & 4 Vic. c. 105.

A person who has given bail is considered to be in custody for the purposes of the late Act, 3 & 4 Vic. c. 105. In this case an appearance should have been entered as of last Michaelmas Term; the bail bond has been assigned to the plaintiff; and so long as the original action is pending,

1841.
**FERRIER AND
 OTHERS,
 v.
 PURCELL.** the defendant is supposed to be in custody on mesne process; *Bateman v. Dunn*(a); *Dalton v. Gibb*(b); *Jackson v. Cooper*(c); *Norris v. Brighton*(d), are authorities for the present application(e).

Nelson, on the other side.—This is a new application. The defendant, in the original action, who ought to have given bail in bar, in November last, now comes forward, seeking to enter a common appearance. When proceedings are taken on a bail bond, the Court will doubtless give relief on proper terms, but will not allow the defendant in the original action to stay proceedings against the bail without an affidavit of defence on the merits; *Grottick v. Bailey*(f). The omission of this affidavit is as fatal under the present as under the old law.

O'Leary in reply.—The same objection was raised in the cases already cited, but the Court decided that no affidavit of merits was necessary(g).

COURT.—The Court of Common Pleas in England appear to have decided that where there have been proceedings on the bail bond, the Court will stay them, and order the bail bond to be cancelled. It is desirable, in order to prevent the conflict of decisions, to follow those of the English courts, and we will adopt them in the present instance; but as the defendant has been late in his application, he should put the other party in a condition to go to trial and pay them the costs of this motion.

(a) 7 D. Prac. C. 105.

(b) 6 Scott 751; 7 Dow. Pr. c. 143, S.C.

(c) 7 D. Prac. C. 5.

(d) 6 Scott 752.

(e) See all these cases collected in Mr. Smythe's very useful comment on the Act for the Abolition of Arrest, &c. p. 28.

(f) 5 B, and A. 703.

(g) See *Lush's Prac.* 646).

Lessee VOIDAL *v.* EJECTOR.

1841.

EXCHEQUER
OF PLEAS.
Wednesday,
January 20.

EJECTMENT for Non-payment of Rent.—*Richard Martin* moved, on behalf of the lessors of the plaintiff, that the service of the ejectment and summons in this cause effected on the first day of this term(a), might be deemed good service, and be received *nunc pro tunc* as of Saturday, 9th January. It appeared that one *William Borer*, the tenant against whom this ejectment was brought, had taken the benefit of the Insolvent Act, but no sub-assignment was executed to his assignee by the provisional assignee of insolvent debtors. *Mr. Mitchell*.—On the 9th of January, (Saturday,) several attempts had been made to serve the ejectment on *Mr. Mitchell*, but the persons employed to serve it could not discover his residence, or see him. On Monday, the 11th January, being the first day of Hilary Term, a copy of the ejectment was left with the house-keeper of the Insolvent Court, who was desired to give the same to *Mr. Mitchell*. It was also sworn that *Mr. Mitchell* was in no wise interested in this case; but as having in his official capacity of provisional assignee of insolvent debtors, the legal estate vested in him, in cases in which the sub-assignments have not been taken out; and that he never takes defence to ejectments in which insolvents are concerned, unless specially ordered by the Insolvent Court. All other proper parties had been served with copies of the ejectment.

The Court will not allow service of an ejectment *nunc pro tunc* on the provisional assignee of insolvent debtors when service was not made until the 1st day of the term in which the ejectment is sought to be moved on, though such assignee is only made a party *pro forma*.

(a) An ejectment cannot be moved on, so as to obtain judgment of any term, unless it has been served before the first day of that term. Longfield Ej. p. 25.

1841.

LESSEE
VOIDAL
v.
EJECTOR.

Affidavits are allowed in other cases to be filed
pro tunc; *Hill v. Hoare*(a).

COURT.—We cannot grant this motion. It seems to
been made necessary in consequence of the plaintiff's
delay. These enquiries should have been made b
service of the ejectment. We do not know that suc
order has ever been made; you must serve the eject
over again.

(a) 1 Chit. Rep. 72.

1841.

EQUITY
EXCHEQUER.

Thurs. Jan. 21.

Service of
process under
4 & 5 Wm. 4,
c. 82, allowed,
and appear-
ance entered,
where the affi-
davit of service
was sworn be-
fore a Justice
of Peace, in
the co. of M.
in America,
and the de-
fendant not
personally
known to the
person who
served such
process.

Administratrix of ATKINSON v. WATSON

MR. CHAMBERS moved that the service already had
the defendant, now residing at *Demopolis*, in *Marengo*, i
State of *Alabama*, in North America, be deemed good se
An order had been made on the 15th June, 1839, unde
4 & 5 W. IV. c. 82, directing that the service of the sub
in this case upon this defendant should be deemed
service, provided that within four months from the c
personal service of the subpœna of the prayer of the
and of a copy of that order could be effected. The s
vit on which this motion was grounded, after recitin
order and subpœna, stated, that the deponent, on th
of January, 1840, served the defendant *Peter Mo
Watson*, with two copies of the order, and the docu
annexed thereto, by leaving the same at his residence
showing him the original subpœna and order of the
June, 1839, that previous to the service, the dep
made enquiries from two residents of *Demopolis*, and :

tained that this *Peter Montagu Watson* was the only son of ——— *Watson*, deceased, and that deponent had been so told by the defendant himself. That there was no chief magistrate of *Marengo*, nor any British officer, civil or military, in the county of *Marengo*; but the affidavit was sworn before the post-master of *Demopolis*, who was a justice of the peace for the county of *Marengo*. The present application was made, that the service had might be deemed good service, and that an appearance might be entered for the defendant.

1841.
ADMINISTRATOR OF
ATKINSON
v.
WATSON.

RICHARDS, B.—I think you sufficiently identified the person upon whom the order directed service to be made. The 4th and 5th Wm. IV. c. 82, differs from the previous Act 1 and 2 Wm. IV. c. 33; the earlier Act contained a proviso that along with the subpoena to be served under that Act, a copy of the prayer of the bill should also be served, and that no process of contempt should be entered, nor any decree be made absolute, without the special order of the court. The difference between the two Acts is, that after providing for the substitution of service, the 4 and 5 Wm. IV. proceeds, that afterwards upon affidavit of service, pursuant to the order, an appearance may be entered. So that once we allow an appearance to be entered, you go on in the ordinary course. You proceeded regularly under this order; all that we can do is to allow you to enter a common appearance.

Motion granted.

1841.

EXCHEQUER
OF PLEAS.Monday,
January 25.

Where a judgment was confessed, and the confessor became insolvent, admissions by the insolvent in his schedule, in 1818, and of his assignees in their answer to a bill filed in 1826, to raise the debt, of the existence of the judgment, are sufficient grounds for a *scire facias* to revive it.

NELIGAN v. GUNN.

HICKSON, Q. C., moved for liberty to issue a *scire facias* to revive a judgment of Michaelmas Term, 1813, in the penal sum of £200. In 1818, the defendant filed his schedule as an insolvent, and in it set out the judgment-debt, fully admitting that the sum was then due. He was subsequently discharged as an insolvent, and soon afterwards died. In 1826, *Neligan*, after the death of *Gunn*, filed a bill in Chancery, to raise the amount of the judgment debt; but in consequence of frequent promises of payment made by the assignees of the insolvent, the plaintiff did not prosecute his suit. The answer of the assignees had fully admitted the debt. The judgment had been re-docketed in 1829, and no part of the defendant's real property had been sold. *M'Carthy v. O'Brien(a)* was cited in support of the application.

COURT.—Take a conditional order, serving the assignee and the heir at law.

(a) 2 Ir. Law Rep. 67.

Lessee O'SULLIVAN v. M'SWINEY.

1841.

EXCHEQUER
OF PLEAS.
January 19.

EJECTMENT on the title on the demise of *Justin O'Sullivan*, for recovering of one-eight part of the Island of *Sherkin*, in the county of *Kerry*. *Silvester O'Sullivan, M'Fineen Dubh*, was seized in fee of *Sherkin Island*, and died in 1808 without issue and intestate, leaving a sister, *Mary Anne Browne*, and four nieces, the daughters of another sister, *Elizabeth O'Sullivan*, surviving him. The lessor of the plaintiff contended, that the sister and four nieces of *M'Fineen Dubh* were his co-heiresses at law, and that upon his death *Mary Anne Browne* became entitled to one moiety of the island, and his four sisters to the other. In 1810, the lessor of the plaintiff, *Justin O'Sullivan*, married *Margaret*, one of the four nieces of *M'Fineen Dubh*. In Trinity Term, 1810, a judgment in ejectment was recovered of the Island of *Sherkin* against one *Richard O'Sullivan*, upon the demise of Mrs. *Browne*, one of the four nieces of *M'Fineen Dubh*. In September, 1810, the *habere* was executed, and possession of the entire island was delivered to *Peter M'Swiney*, the father of the defendant, as the agent of Mrs. *Browne*. *Margaret O'Sullivan* died, leaving issue by the lessor of the plaintiff, a son, *Eugene O'Sullivan*, her heir at law; Mrs. *Browne* died in 1824, leaving one daughter, *Lucy*, the wife of the defendant *M'Swiney*. On Mrs. *Browne's* death, the title of the defendant and his wife to one-half of the island, accrued; but they remained in exclusive possession of the entire until 1837, when an ejectment was brought for three-eighths of the island, in which ejectment (amongst other demises) a demise was laid in the name of *Eugene O'Sullivan, Margaret's* eldest

Where A, a tenant in common, had been in exclusive possession of the rents of S. for more than 20 years, and an ejectment had been brought by another co-tenant in common, to which A had taken defence, and on which no further proceedings were had, taking such defence is not conclusive evidence of adverse possession against A's co-tenant in common.

1841.
 LESSEE
 O'SULLIVAN
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son, which ejectment failed in consequence of the present lessor of the plaintiff having been tenant by the courtesy of *Margaret's* share, and no demise having been laid in his name. Another ejectment on the title had been brought, as of Easter Term, 1838, by the present lessor of the plaintiff for *Margaret's* share, in which the jury had found a verdict for the plaintiff, which case had already come before this court on a bill of exceptions to the Judge's charge^(a). The exceptions were allowed, and a *venire de novo* awarded. At the trial of the present ejectment, the plaintiff gave in evidence the pedigree, which was admitted, and the judgment in ejectment of 1810. The defendant contended that the lessor of the plaintiff was barred by the Statute of Limitations, 3 and 4 Wm. IV. c. 27, in as much as the possession of Mrs. *Browne* and the defendant had been for more than twenty years adverse to the title of the lessor of the plaintiff, and at all events had been adverse to his title previous to and after the passing of the 3 and 4 Wm. IV. c. 27^(b). Several witnesses were examined for the defendant, to prove the continuance and adverse nature of his possession; he also gave in evidence an attested copy of certain proceedings in an ejectment, brought in 1828, upon the demise of the present lessor of the plaintiff against the present defendant, to recover a moiety of *Sherkin Island*; and contended that the defence taken by the defendant to that ejectment was conclusive evidence that the possession of the defendant was adverse to the lessor of the plaintiff at the time when this ejectment was brought, and also at the passing of the Act. The learned Judge refused to direct the jury to that effect, but let the case go to them

(a) 1 Ir. Law Rep. 89.

(b) This Act received the Royal Assent, July 29, 1833.

as a jury question, reserving leave to the defendant to move to have a verdict entered for him, if the Court should be of opinion that such evidence was conclusive of an adverse possession at the time of the passing of the Act. The jury found a verdict for the plaintiff. A conditional order having been obtained on the 22nd November, 1839, that the verdict had for the plaintiff should be set aside, and a verdict entered for the defendants, or for a new trial, *Bennett*, Q. C. now moved to make it absolute.

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From 1810 to 1838 the defendant and Mrs. *Browne* his mother-in-law have been in exclusive possession of this island, and the question here is, was that possession adverse or not? Before the new Statute of Limitations, the twenty years possession of one tenant in common was no bar to another tenant in common in an action of ejectment, because the possession of one tenant in common was the possession of all. If that Act went no farther than the 2nd section, no question could arise; but it is said that the 15th section of that Act gives the lessor of the plaintiff a right. The possession would not be *adverse*, because merely *exclusive*, and a tenant in common had, by the 15th section, five years to bring his ejectment, if the possession were not adverse; but if the possession were adverse at the passing of the Act for any space of time, he was barred. An ejectment was brought in 1828, by *Justin O'Sullivan*, and served on *M'Swiney* the defendant, who took defence; this was before the new Limitation Act had passed. At the first trial the Judge told the jury that though the defendant's possession was adverse at the passing of the Act, still, as the action was brought within five years, the lessor of the plaintiff was entitled to recover. It was in that case held, that the jury had been misdirected; we now allege that

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1841. *Camden v. Cowley(a)*; *Swain v. Hall(b)*; *Roberts v. Karr(c)*.
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Collins, Q. C. in reply.—This matter of adverse possession is certainly evidence for a jury, but as in all matters of fact submitted to a jury, the construction they put upon it is matter for the court to decide. From 1810 when possession was first delivered to Mrs. *Browne*, every act of hers is only consistent with a retainer for her own exclusive benefit; a claim to receive rent exclusively is evidence of adverse possession; *Peaceable d. Hornblower v. Reid(d)*, one tenant in common cannot maintain ejectment against another without actual ouster having taken place, but he may do so if his cotenant has actually ousted him; and if a case of adverse possession is not made in such an action, the practice is, that a special consent rule is entered into, admitting lease and entry but not ouster;—and thus the question of ouster is left open. But if such a special consent rule be not made, then the common consent rule is evidence of actual ouster, *Adams Ej.* 54, 91, 268. A tenant in common taking defence to an ejectment admits actual ouster, of which the consent rule is evidence, *Oates v. Brydon(e)*; *Doe d. White v. Cuff(f)*; *Doe d. Culley v. T aylerson(g)*. In Ireland the consent rule is not entered into as in England; but the party by taking defence impliedly enters into it; *Smith and Batty*, 481, n. *Batty*, 438, n. By the defence taken by *M'Swiney* in 1828 he admits actual ouster; it may be said that this is a fictitious proceeding; still it is a proceeding limiting the rights of the parties;

(a) 1 Wm. Bl. 417.

(c) 1 Taunt. 501.

(e) 3 Bur. 1895.

(g) 3 Per. & D. 548.

(b) 3 Wils. 47.

(d) 1 East. 568.

(f) 1 Camp. 773.

and if the case between the parties be merely that one is bailiff of the other, the case is tried on a special consent rule: if the defence is different, the parties enter into the common consent rule. The consent rule admits service of declaration, *Dodman v. Gibbs*(a). [RICHARDS, B.—If they had filed a second declaration in that ejectment proceeding you might have applied to the court for a special consent rule at any time before trial.] That should be done before defence; for defence in this country implies the consent rule. [RICHARDS, B.—The court would have excused you; the taking defence may be made in such a way as not to preclude you.] If *M'Swiney* did not mean to rely on ouster, he might have done so. [BRADY, C. B.—Taking defence to an ejectment is little more than appearance; the court would be slow to say that the way of taking defence would be evidence of an actual ouster]. The plea in this court is the taking defence. The second declaration only substitutes the real defendant for the casual ejector. The litigation of 1828 related to the same subject matter, and was conclusive evidence that the possession was of an adverse character; *Nepean v. Doe d. Knight*. [BRADY, C. B.—Is there no evidence of any act one way or other between the parties subsequent to the ejectment of 1828 until the passing of the act? Possession may have been adverse in 1828, but are the jury bound to find it so at the passing of the act?] Yes: when one state of facts is shown to have existed, the presumption is that it continues.

Cur: adv: vult.

BRADY, C. B.—In this case the Lessee of *Justin O'Sullivan* is the plaintiff in an ejectment on the title, and

(a) 2 Car. & P. 615.

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Peter M'Sweeny is the defendant ; there has been a verdict for the lessor of the plaintiff. The case has now come before us on a motion for a new trial, or that a verdict should be entered for the defendant. The lessor of the plaintiff has laid his demise upon the 19th of May, 1838, and the facts of the case are simply these : *Sylvester O'Sullivan*, who was seized in fee of the premises in question, died in the year 1818, intestate, leaving one sister, *Mrs. Browne*, and four nieces, daughters of another sister, who died some time before him. The lessor of the plaintiff claims one-eighth part of the premises, in right of one of those daughters. In 1810, an ejectment was brought on the demises of *Mrs. Browne*, and of the four nieces of *Sylvester O'Sullivan* against some person who had got into possession of the premises without having any title to them ; that ejectment succeeded, and possession was given under it, in September, 1810, of the entire land. Possession on that occasion was taken by the agent of *Mrs. Browne*, *Mr. M'Swiney*, who was the father of the present defendant, and who, in 1814, married *Lucy*, the only daughter of *Mrs. Browne*. This *M'Swiney*, the father, died in the year 1824 ; and thus, from 1810 to the bringing of the ejectment, there was a continued possession in *Mrs. Browne*, and those claiming under her. The lessor of the plaintiff represents one of the co-heirs of *Sylvester O'Sullivan* : and a question arose as to whether a title had not been established against him by adverse possession. The case was before tried, and a verdict was had ; a bill of exceptions was taken, and ultimately a *venire de novo* was awarded. The point decided in the former case depended on the construction of the 3 and 4 Wm. IV. c. 27 ; and I concur in the opinion that the operation of that Statute was to a certain degree retrospective, as to the possession

of tenants in common ; and though, before that Act, the separate possession of one (in the words of the 12th section) co-parcener, joint-tenant, or tenant in common, of the entirety, or more than his individual share of such land, was not adverse as against the owners of the other shares, yet, by the operation of the Act, the possession which was not adverse prior to that Act, became by that Act adverse as against tenants in common, who were not in possession. However, the Court decided, that although that was the operation of the Act, yet that, under the 15th section, such separate possession would not prevail, unless the possession was adverse as against these parties at the time of the passing of the Act ; and the case went again to trial on that question. The principle decided by the Court of Exchequer, on a former occasion, has been confirmed by the Court of Queen's Bench in England, in the case of *Cully v. Doe d. Taylerson(a)*, in which it was decided that where one tenant in common has been out of possession for twenty years prior to the passing of the Act, he is barred by the 2nd and 12th sections from bringing his action, but may maintain it under the 15th section, within five years after the passing of the Act, if the other tenant in common has not been in possession adversely to him at the time of the passing of the Act. Accordingly the question on the present ejectment was, whether the possession of the defendant *M'Swincy* was, under the old law, adverse or not at the passing of the Act. Two points have been raised on this motion. The question of adverse possession, with all the circumstances of the case, was submitted to the jury at the trial ; and there being no specific objection to the charge of the learned Judge, we are now

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(a) 3 Per. & D. 539.

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to presume that the question was left by him, with all proper comments on the circumstances and facts that were brought forward. But now the defendant contends, that either there has been conclusive evidence given of his adverse possession, or, that the verdict of the jury has been against the weight of evidence; in other words, that the Judge should have told the jury that they were bound, from the evidence submitted to them, to find a verdict for the defendant; or that they themselves should have deduced from that evidence that the possession of the defendant, had been adverse to the plaintiff. It therefore becomes necessary to consider what was the law before the Statute was passed. Now, it is clear, that before the Statute, the exclusive possession of one tenant in common was not adverse as against the owners of the other shares. This is recognized by the 12th section of the Statute, which says, "when any one or more of several persons entitled to any land or rent as co-parceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their individual share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons, other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, of any of them." Again, in *Doe v. Prosser* the same doctrine is expressed in these words: "So in the case of tenants in common, the possession of one tenant in common, *eo nomine*, as tenant in common can never bar his companion, because such possession is not adverse to the right of his companion, but in support of their common

“title.” And without citing any more authorities, the case of *Culley v. Doe d. Taylerson* has expressly recognized the same doctrine; for it states that, “generally speaking, “one tenant in common cannot maintain an ejectment “against another tenant in common, because the possession “of one tenant in common is the possession of the other, “and to enable the party complaining to maintain an “ejectment, there must be an ouster of the party complaining.” It had always been held, that in order to constitute adverse possession between co-parceners or tenants in common, it must have been proved that there was an actual ouster by the party in possession; or there must be other circumstances in the case from which the fact of an ouster may be presumed. But it is contended here, that the Court is to be at liberty to say, that particular circumstances are or are not to be conclusive evidence of that fact, and to withdraw the case from the jury. It appears, however, from all the authorities, that unless an actual ouster be proved, every thing is to be left to the jury; and that they are to say whether there has been an ouster amounting to adverse possession. It is so laid down in *Doe v. Prosser*, by *Aston, J.*—“There have been frequent “disputes as to how far the possession of one tenant in “common shall be said to be the possession of the other, “and what acts of the one shall amount to an actual ouster “of his companion. As to the first, I think it is only “where the one holds possession as such, and receives the “rents and profits on account of both. With respect to “the second, if no actual ouster is proved, yet it may be “inferred from circumstances, which circumstances are “matter of evidence to be left to a jury.” Again, in *Doe v. Williams* the same position is laid down as to mortgagor and mortgagee, and the possession of the mort-

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gagor is not to be considered adverse. Again, in *Culley v. Doe d. Taylerson*, the Lord Chief Justice *Denman* seems to consider the law to be the same, although in that case the judge appears to have told the jury that there was no adverse possession; he says, "But where the claimant tenant in common has not been in participation of the rents and profits for a considerable length of time, and other circumstances concur, the judge will direct the jury to take into consideration whether they will presume that there has been an ouster;" plainly implying that it would be an objection to the charge that he had not left that fact to the jury.

Now, if ever there was a case in which the first possession was not adverse, it is the present; because that possession was recovered from a hostile claimant in an ejectment by *Mrs. Browne* herself, not on her own demise only, but on demises by the other co-parceners also. Therefore, if he remained in possession for ever, the possession, we must conclude, was taken by *M'Swiney* the elder, not on account of himself alone, but on account of the other co-parceners also. Under these circumstances the Court cannot say that there was no case to be left to the jury. It is, however contended, that a particular piece of evidence has been given which was conclusive. That piece of evidence was, that in the year 1828, the lessor of the plaintiff brought an ejectment, claiming, along with other co-parceners, one-half of the premises. Defence was taken to that ejectment in the name of the present defendant, but nothing was done on it. It does not appear why it was not prosecuted; there is no evidence, one way or the other, what were the proceedings in that ejectment. It would appear only that an ejectment was brought, claiming the possession of this

share, and that defence was taken thereto; but no more appears. This was evidence for the jury to presume or not to presume an actual ouster at the time of the ejectment. But the question is, what was the position of the parties on the 24th July, 1833, five years after that ejectment was brought; and it would be difficult to decide that, after the lapse of five years, or in any assignable period after, the facts of an ejectment having been brought, and defence having been taken to it, must be taken as conclusive evidence of adverse possession.

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On these grounds I am of opinion that this ejectment of 1828, was, with the other facts of the case, matter for the jury; and the Court will not lay down that this ejectment of 1828, which was no further dealt with than I have said, is to be conclusive evidence of adverse possession in 1833. The jury took the whole case into their consideration; I assume that the case was submitted to them with all proper directions, and they, acting on such directions, found a verdict for the lessor of the plaintiff. That verdict was clearly according to the right of the party, supposing there had been no bar of the Statute of Limitations; and therefore, as to the right and title of the parties, it appears to be according to justice. If this Statute had not passed, it could not be contended that the lessor of the plaintiff should not have succeeded; it is indeed almost conceded that, without the Statute there would be no case to resist his claim. The defendant gets the benefit of the new bar, acting retrospectively on his possession; but he seeks to oust the other party of the benefit arising from his possession. The jury found that there had been no adverse possession; and I do not think that where the verdict is according to law and to the justice of the case, the Court

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will make a verdict which the jury refused to make, or will set aside this verdict, because they think the jury might have decided the other way. In the case of *Wilkinson v. Payne*(a), Lord *Kenyon* says, it is a general rule that in a hard action, where there is something on which the jury have raised a presumption agreeably to the justice of the case, the Court will not interfere by granting a new trial where the objection does not lie in the point of law; and *Buller, J.* says, "If the verdict be consistent with the justice, conscience, and equity of the case, we ought not to grant a new trial." That is a strong case; the only difference between it and the case before us is, that there the jury found for the presumption, and here they refused to find it. For all these reasons I think the Court ought not to direct a verdict.

FOSTER, B.—In this case there has been a verdict for the plaintiff, and the question is, whether it should stand or not? As to this, I agree with the opinion already expressed by the Lord Chief Baron. The day of the demise in the ejectment of 1838, is within five years after the passing of the 3 and 4 Wm. IV. c. 27; the present action was brought within those five years; if it had been otherwise, I should be of opinion that the present plaintiff was barred. But here the question is clearly open, whether the possession of the defendant was adverse or not? The 3 & 4 Wm. IV. c. 27, sec. 15, enacts, that "when the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person or the

(a) 4 T. R. 468.

“ person claiming through him, may, notwithstanding the
 “ period of twenty years, herein-before limited, shall have
 “ expired, make an entry or distress, or bring an action to
 “ recover such land or interest, at any time within five
 “ years after the passing of this Act.” I think therefore,
 that if the possession of Mrs. *Browne's* representative was
 adverse to that of the plaintiff at the time of the passing of
 the Act, he would be barred ; but otherwise, that his right
 was not barred, and that he was entitled to bring his action
 within the five years. Mrs. *Browne's* possession could not
 have been adverse at all but for the 3 and 4 Wm. IV.
 c. 27, and the question was open to the jury under that
 Act, whether the possession of the defendant was adverse
 or not ; if his possession were adverse when the ejectment
 was brought, the plaintiff cannot succeed, for he is out of
 the saving of the Statute ; but if not adverse then, the Sta-
 tute does not bar him. Yet, if the five years had elapsed,
 after the passing of the Act, and before the ejectment was
 brought, the possession must have been considered adverse.
 That, however, not being the case, the question was open
 to the jury ; it was a perfectly fair question for a jury to
 decide, and properly left to them by the judge. They de-
 cided perhaps differently from what others in this court
 would have done, but I think they decided properly. Is
 not the question then that the jury had no right to find as
 they did, and that we ought to send the question to them
 again ? Now, I think the question was fairly within the
 province of a jury. The only remarkable circumstance in
 this case was the question whether the ejectment in the
 year 1828, was such as to take from the jury that power
 which they would otherwise have possessed ; the question
 is therefore reduced to this : was the ejectment of 1828,
 and the defence taken to it, such a fact as to take the point

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out of the discretion of the jury. The present plaintiff brought that ejectment to recover a portion of the lands in question, how much does not clearly appear; and defence was taken to that ejectment, but it did not go to trial. Here is ground for raising an argument, that the defendant's possession was adverse in 1828, and that it might have so continued till 1838. But the jury was properly the tribunal to decide this; and they found that the possession was not adverse to the rights of the plaintiff; I think the jury have a right to form their own opinion, and I, as a Judge, pronounce no opinion on the subject, but defer to theirs. It is sufficient for the lessor of the plaintiff, that there was a possibility that the possession of the defendant was not adverse in 1828; if so, the present plaintiff has a right to maintain his ejectment, for there are no grounds for saying that possession was adverse in 1838, unless it was so in 1828. Now there may be some evidence that the possession was adverse in 1828, but unless that evidence is so conclusive as to exclude any other supposition, it cannot be said that the jury formed a wrong opinion. Before we undertake to condemn the jury, we should recollect that the ejectment of 1828 was not proceeded in. The defendant may have taken that defence for the premises, (and that I think a probable supposition,) not included in that ejectment. That ejectment, though deserving of great consideration from the jury, was not absolutely conclusive, and if it falls short of being so, they had to deal with it, and they have done so. The defendant has no case except the alleged conclusiveness of the taking defence to the ejectment of 1828. Did, then, that ejectment of 1828 give the defendant an invulnerable case? If not, the jury had a right to dispose of it; and they appear to have disposed of it according to right.

RICHARDS, B.—This is, in my opinion, a case of considerable importance, and it is one in which my mind has fluctuated much. I state the grounds of the opinion I am going to pronounce, lest it should be misconstrued.

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By the second section of 3 & 4 W. 3, c. 27, it is enacted, that after the day on which that Act was to come into operation, "no person should make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." That section did not affect tenants in common, or co-parceners; for by the law as it stood at the passing of that Act, the possession of one tenant in common was the possession of them all; but the 12th section of the same Statute brings co-parceners and tenants in common within the operation of the second section. The 12th section enacts, that the possession or receipt of the entirety or more than his share of land or rent, by one co-parcener, joint tenant, or tenant in common, such possession or receipt shall not be deemed to have been the possession or receipt of or by the other persons entitled to the other shares of the land or rent.

In this case the plaintiff and the party under whom he derives, were, in point of fact, out of possession from 1810, except so far as the possession of his co-tenant in common

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may in law be considered as his possession ; but more than twenty years having elapsed from 1810 to the bringing of the present ejectment in 1838, the plaintiff would be barred by the 2nd and 12th sections, (the Statute being manifestly in this respect retrospective in its operation,) unless he can show that he is within the saving contained in the fifteenth section ; in other words, unless he can show that the possession of the defendant has not been adverse at the time of the passing of the 3 and 4 Wm. IV. according to the state of the law as it stood at the passing of that Act. The question in controversy in this ejectment turns wholly upon this : was the possession of the defendant adverse at the time of the passing of the 3 and 4 Wm. IV. c. 27 ? The jury, in finding for the plaintiff, have pronounced in their opinion, that it was not. But the defendant says it was ; and insists that upon the facts proved, the verdict ought to have been for him. He says that he and those under whom he derives, were in exclusive possession or receipt of the rents from 1810 to 1833 ; and further, that the lessor of the plaintiff, with others, in 1828, brought their ejectment on the title for a portion of the property in question, (including the part now sought to be recovered by the plaintiff in this action,) and that the defendant took defence on the 27th November, 1828, to that ejectment. And admitting that possession by one tenant in common, even for the length of time that I have stated, would not alone be sufficient, according to the law before the Statute to establish our adverse possession in him ; the defendant, nevertheless, contends, that that circumstance, accompanied with the ejectment of 1828, and defence thereto, are conclusive to do so ; and that the verdict should therefore be entered for him, or a *venire de novo* awarded. Undoubtedly, if the possession of the defendant were adverse at the

passing of the 3 and 4 Wm. IV. c. 27, no matter for what length of time, however short, the plaintiff would be barred by the operation of the 2nd and 12th sections of the Act, taken together, the ejectment in this case not having been brought till the year 1838; *Nepean v. Knight*(a); *O'Sullivan v. M'Swiney*(b); *Cully v. Doe d. Taylerson*(c), and would not be within the saving of the 15th section, (the statute being as I have mentioned, in this respect retrospective,) and the defendant having been in possession for more than twenty years prior to the bringing of the ejectment. With respect to the oral evidence in the case, I confess I do not feel much pressed by it; that evidence was before the jury, and they gave it, I assume, the weight that it was justly entitled to; but the admitted exclusive possession from 1810, and the ejectment and defence of 1828 press me very much, and create in my mind a great deal of difficulty. Upon the best consideration, however, which I can give the subject, I would say that the defence taken by the defendant in 1828, to the ejectment brought by his co-tenant in common, ought not to be likened to a defence taken by a party not standing in the relation of a tenant in common with the claimant. In the case of tenants in common, the defence would by no means be conclusive of an adverse claim to the exclusive possession by the party taking it, for undoubtedly it was competent to a tenant in common to defend an ejectment brought by his co-tenant in common, by showing that no actual ouster had taken place; thus admitting, instead of controverting the right of his co-tenant in common. In England, no doubt, it was necessary for a defendant intending to rely on such a defence to apply to the Court to be permitted to enter into a special rule to

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(a) 2 Mees & W. 894.

(b) 2 Ir. L. R. 89.

(c) 3 Per. & Dav. 539.

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confess lease and entry only ; and in this country where no such rule is actually entered into, it might have been necessary to obtain some special order on the subject before the trial. But that does not alter or affect the equivocal nature of the act of the defendant, which is relied upon in this case, as establishing adverse possession. All I mean to say is, that from the very peculiar nature of this case, and the relation in which the parties stood towards each other, the mere taking defence by the defendant to the ejectment in 1828, did not necessarily imply or import that the defendant disputed or intended to dispute the title of the lessor of the plaintiff as a co-tenant in common with him, the defendant. Had the parties not stood toward each other in the relation in which they did, or had there been other sufficient evidence to establish that the intention of the defendant in taking such defence, was to dispute the title of the lessor of the plaintiff ;—had there been a previous demand by the lessor of the plaintiff, or his co-tenant in common, for the proportion of the rent to which he was entitled, or for a participation in the possession, and a refusal, or had there been any unequivocal act of the defendant showing a claim to the exclusive title of the premises in question, I should at once admit that from the ejectment of 1828 and defence thereto by the defendant at that time, and no intervening circumstance occurring to change the nature of that possession, up to the passing of the 3 and 4 Wm. IV, I would feel bound to hold that the possession of the defendant continued and remained adverse up to that time, and consequently that the plaintiff would be barred in the present action.

I admit, that when one man against the will of another, holds possession of lands claimed by such other person, and

when required to give up and relinquish such possession, refuses to do so, and more especially when he resists proceedings instituted in a court of justice for the recovery of the same, it never can afterwards be contended, that a party so acting does not hold adversely against such a claimant; and indeed I know of no other means by which any person, in possession, can more effectually and unequivocally signify his intention of holding adversely, than by contesting in a court of justice, the right of a party claiming title against him. I admit also, that we are not, in construing the 15th section of the 3 & 4 W. IV. c. 27, to confound title with possession; no matter what the title of the party in possession originally might have been, the question is, what right or title did he, in point of fact, claim to hold by, at the time of the passing of the 3 & 4 W. IV.; and if he insisted on holding adversely at that time, and demonstrated an unequivocal intention so to hold, I do not see how we could adopt the verdict of any jury that found the fact differently; but as I have already expressed, the circumstances under which the defendant held in this case, and the acts relied on by the plaintiff, as evidencing the character in which the defendant so held, are equivocal. And although I do not say, that I would have drawn the same conclusion as the jury appear to have done from the facts brought before them, yet the verdict appearing on the whole to be very consistent with the justice of the case, I do not feel called upon to set it aside.

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Motion refused.

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OF PLEAS.
January 30.

TUTHILL v. BRIDGMAN.

Malice is not necessary to sustain an application under the 43 G. 3, c. 46, s. 2, by a defendant for costs. It is sufficient if a party be arrested, but not held to special bail. Where the cause at *Nisi Prius* was referred, and the *postea* endorsed for the amount awarded, this was held equivalent to a recovery by verdict.

HENN, Q. C., with whom was *Freeman*, moved the Court that the defendant might be allowed his costs, under the 43 Geo. III. c. 46, s. 3. This was an action brought by the plaintiff, as indorsee, to recover the amount of two bills of exchange, one for £40, and the other, which it was contended was only a renewal of the first, for about £41 11s. 0d.; this last was not paid. The defendant was arrested for £72, or rather gave bail to the sheriff, as on an arrest for that sum. On the 30th of January, 1839, the declaration was filed; the defendant pleaded to issue, and the cause not having been taken down to trial, on the 27th of January, 1840, he obtained a conditional order for judgment as in case of nonsuit. This was discharged on the plaintiff giving a peremptory undertaking to go to trial the ensuing assizes, and he accordingly took down the record for trial at the Limerick Spring Assizes of 1840. The case was referred to arbitration, and the arbitrator found for the defendant as to one bill, and for the plaintiff on the other, and the register indorsed on the *postea* a verdict for the plaintiff for £32 2s. 6d. and 6d. costs. The arrest being for so large a sum as £72, and the award which, in fact, is to be considered as a verdict of the jury, being for £32, only the defendant is entitled to his motion; as from the plaintiff being partner of the drawer of the bill, he must have well known that one was merely a renewal of the other.

Cooper, Q. C., & *O'Hara*, *contra*.—This is a penal act, and to sanction an application on it, the circumstances must be such as to enable the defendant to maintain an action for a malicious arrest. The words are—"if it be made appear,

“ upon hearing the parties by affidavit, to the satisfaction of
 “ the Court, that the plaintiff had not *any reasonable or*
 “ *probable cause* for holding the defendant to bail.”

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Now, here the defendant was not *arrested*, and held to special bail. He never was held to special bail, as he gave bail to the sheriff, and the cause of bail was disallowed, and he was discharged on a common appearance being entered. This is decided by the cases of *Bates v. Pilling(a)*, and *Amor v. Blofield(b)*. Malice also is essential(c). The defendant here is not entitled to his costs under the Act, as the plaintiff did not recover by *verdict*, but by the award of an arbitrator; *Keen v. Deeble(d)* Per *Littledale J.*, in *Holden v. Raith(e)*. But as to the merits, it appears that the plaintiff took up the original bill, and subsequently *Wheeler* brought him the bill called a renewal. [PER CUR.—If he paid the original bill out of his own pocket, it is almost conclusive evidence that he could not have known the second bill was a renewal].

Freeman contra.—As to the merits, and cited *Tipton v. Gardiner(f)*.

BRADY, C. B.—On the facts of this case, we must consider the award as substantially the verdict of the jury, and the sum as recovered, within the words of the act. For several reasons, a party arrested is within the meaning of the act, and entitled to make this application; he is within all the evils contemplated to be remedied, and

(a) 2 Dowl. P. C. 367. 2 Cr. & Mee. 374, S. C. (b) 2 M. & Scott 156.

(c) 1 B. Moore. 92. *contra* *Donlan v. Brett*, 10 B. & C. 117; *Earle v. Wynne*. 1 Cr. & Mee. 532.

(d) 3 B. & C. 491.

(e) 4 Nev. & M. 466.

(f) 4 Ad. & E. 317.

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clearly has received the injury to be compensated. The right of the defendant is not contingent on the finding of the jury, being for less than the amount for which the party was held to *special bail*. The question is, whether the party was arrested without probable cause, and not whether the arrest was malicious; but if it was without probable cause, the onus is on the defendant to show it to the satisfaction of the Court. Here the action and arrest were for the amount of two bills, and payment of one was made out only inferentially. The bill passed through *Wheeler's* hands, and there is no evidence that *Tuthill* knew this bill was a renewal, and it was discounted by *Tuthill's* clerk, as *Tuthill* swears, for his own purposes. *Bridgman* should have called on *Tuthill* for the original bill, at the time of passing the renewal. Under these circumstances we cannot say, that *Tuthill* had not probable cause for arresting the defendant for the amount of both bills, and the motion must therefore be refused with costs.

Motion refused with costs(a).

(a) See *Robinson v. Powell*, 5 Mee & W. 479, 3 Jur. 1033; and for the decisions on the statute generally, 2 Arch. Q. B. Prac. 1148 to 1152.

WHITE v. DOOLAN.

1841.

EXCHEQUER
OF PLEAS.Wednesday,
January 27.

ASSUMPSIT by the plaintiff as indorsee against the defendant, as indorser of a bill of exchange, dated 10th April, 1837, for £16 10s., payable at nine months after date, drawn by one *James Kelly* on *William J. Kelly*, and accepted by him, and indorsed by *James Kelly* to the defendant, and by the defendant to the plaintiff. This bill had been passed by the defendant to the plaintiff, as a settlement for the defendant's own acceptance of another bill for £15, drawn on him by the plaintiff, which had become over due, and was protested. In Michaelmas Term, 1838, the plaintiff, at the instance of the defendant, proceeded against the acceptor *William J. Kelly*, for the sum of £12 10s., then due upon the bill, and obtained judgment, and issued execution against him; but finding that execution unavailable, he then proceeded in the present action against *Doolan*, the present defendant, for the balance of £12. The declaration in this cause was filed in May, 1839. Soon after proceedings were taken against *Doolan*, a person on behalf of *William J. Kelly* came forward, and after several promises to that effect, in September, 1839, paid the balance of £12 then due on the bill for £16 10s., with interest and costs. The person who paid this balance, required the bill upon which it was due to be given up, before he would make such payment, although the plaintiff's attorney represented to him that there were some costs due by the defendant to the plaintiff in respect of it. No further proceedings were taken in the case, by either the plaintiff or defendant, until on the 7th January, 1841, a notice of a motion to enter up judgment as in case of a

Where a bill of exchange was drawn by A on B, and accepted by him, and indorsed by A to C, and by C to W, and A had sued B, and then finding the judgment of no avail against B, afterwards sued C; the Court refused to allow judgment as in case of non-suit to be entered against W, it having been unnecessary for him to proceed in the action. A conditional order must rely on the affidavits to support it, and those filed as cause against it; therefore the defendant on a motion for judgment as in case of non-suit, cannot rely on answering affidavits to those filed as cause.

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nonsuit, was served on the plaintiff's attorney. After service of the notice of the 7th January, (which was not received until the 9th January,) a notice in reply was served on the 9th of January, by the plaintiff, cautioning the defendant against proceeding in the motion. The defendant, notwithstanding, on the 13th January, obtained the conditional order for judgment, as in case of a nonsuit. On the 19th January the plaintiff served a notice, stating that he had filed certain affidavits as cause against the conditional order; and on the 22nd of January, the defendant served another notice of a motion to make absolute the conditional order, notwithstanding the affidavits filed by the plaintiff as cause, and apprising the plaintiff that he would rely upon the *answering affidavits* of the defendant that day filed, on an attested copy of the judgment entered by the plaintiff against *William James Kelly*, on the 1st January, 1839, and on a letter of the plaintiff's attorney to the defendant, of the 9th January, 1841.

Bennett, Q. C., with whom was *M^cMullen*, now moved the conditional order of the 13th January, instant, and proposed to read the supplemental affidavits and documents mentioned in the defendant's notice of the 22nd January, and referred to *Davies v. Cottle* (a).

[BRADY, C. B.—It is a settled rule that a conditional order should stand or fall on the affidavits to support it, and those filed in answer. The case would be interminable if we were to depart from the settled practice. FOSTER, B.—There is no rule more pertinaciously adhered to; but I must say, whenever a new Baron comes into the court, a fresh attempt is made to depart from it. RICHARDS, B.—

You are bound on every principle to state all the facts in the first instance; you are perfectly aware of them, or at least knew all the prominent facts. I, for one, must say, whenever you seek to obtain judgment as in case of nonsuit, when the debt has been paid by another, you are bound to state that fact on your affidavit.]

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B. Keller, for the plaintiff.—It was unnecessary for us to proceed after the bill was paid; suing the acceptor had proved fruitless, and we were obliged to sue the defendant, but soon afterwards a person came on behalf of the acceptor, who paid the debt and costs. It is settled, that if it becomes unnecessary for the plaintiff to proceed in an action, the Court will not give judgment as in case of a nonsuit; *Anonymous*(a); *Smith v. Joy*(b); *Wynne v. Kelly*(c); *Partridge v. Salton*(d); *Monks v. Bonham*(e); *Lessee Uniacke v. Uniacke*(f); *Wright v. Graves*(g); *Tidd. Pr.* 484. This is a still stronger case than the *Anonymous* case cited, for here we did not proceed against the defendant and the acceptor, but against the acceptor in the first instance. The only difference is, that the costs were not given in that case, but the Court will give them as the practice is settled by several cases, and as we apprized the defendant by notice of the grounds on which we meant to rely.

BRADY, C. B.—We are all of opinion that the defendant cannot use these supplemental affidavits. This motion is founded on a statute which says in fact, you shall obtain judgment as in case of nonsuit, unless the

(a) 6 L. R. N. S. 350.

(c) 1 L. R. N. S. 8.

(e) 2 Dow. Pr. C. 356.

(g) *Ib.* 331.

(b) 2 Dow. Pr. C. 410.

(d) 5 Dow. Pr. C. 68.

(f) *Batty*, 333.

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plaintiff show just cause. Now the plaintiff here has shown just cause of not proceeding, because the bill has been paid, and the party would have committed a gross fraud on the defendant by proceeding to obtain judgment for nominal damages, as the defendant was thus discharged. The time for the defendant to make resistance was, when the motion for a nonsuit was made, and consequently it must now be refused with costs.

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 EXCHEQUER
 OF PLEAS.
 Wednesday,
 January 27.

The Court will not allow substitution of service on A, the defendant's law agent, when the proof alleged of A's being such agent is the entry of an appearance two terms ago for the defendant by A.

WALLIS v. AUSTIN.

BALDWIN moved for liberty to substitute the service of the *capias ad respondendum* in this cause, under special circumstances. It appeared from the affidavit of the plaintiff, that the defendant had become embarrassed in his circumstances, and that as the plaintiff had been informed and believed, the defendant, in order to avoid service of process, had quitted Ireland, and had gone with his family to France where he was then residing. It was also sworn that Mr. *William Charles Atkins* had been appointed receiver over the defendant's estates in two petition matters depending in Chancery, and that *Atkins* has been, before his appointment as receiver, the private and confidential agent of the defendant. The plaintiff's attorney also swore, that on search made in the appearance books of this Court, it appeared that in Trinity Term last, common appearances had been entered for the defendant by Mr. *John Bennett*, as his attorney, in two actions, one at the suit of one *Dennis Lane*, the other at the suit of one *Robert Edden*. Personal service of the writ had been effected on Mr. *Atkins*, on the 6th January, and it was now

sought to substitute service on *Bennett* also, as the defendant's law agent.

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v.
AUSTIN.

Where a party resident out of the jurisdiction is present in Court by his attorney, the Court will allow service to be substituted on his land and law agent; *Yeo & Billings Practice*, 6, 7, citing *Sadlier v. Smithwick*, and *Rossiter v. Rossiter*. We have now ascertained that the defendant has a law agent in this country. The refusal of this motion will make it perfectly impossible for the plaintiff to recover his debt.

BRADY, C. B.—I do not think the Court has ever gone so far as this, or that we should be justified in carrying the decisions of the Court farther than they have gone. *Rossiter v. Rossiter* went as far as the Court should go. We do not know how far these proceedings on the records of the Court have gone. We cannot make a rule arising out of the merits of the case.

FOSTER, B.—The Court has been two or three times asked to go so far as this, but refused.

RICHARDS, B.—We cannot grant this motion; *Rossiter v. Rossiter* ought not to be a precedent in any case where the circumstances are not exactly the same.

Refused.

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EXCHEQUER
OF PLEAS.
Wednesday,
Jan. 27.

FITZGERALD v. LOW.

The Court will not allow substitution of service on A, the defendant's law agent, when the only evidence of A being such agent is the bringing of two actions by A, as his attorney, in this Court, two years since, and the taking defence to a sessions ejectment for the defendant in October last.

BALDWIN applied (as in the last case,) for liberty to substitute service on the attorney, and on the land-agent of the defendant. The land-agent had been served. The affidavit stated that the defendant *Low* lived at *Frankfort*, on the *Maine*, and had quitted this country to avoid his creditors. It further stated, that in 1837, *Low* had brought an ejectment in this Court against the plaintiff in this case, and afterwards in the same year brought an action of covenant for rent on the lease of the same premises ; that he proceeded in these causes by Mr. *Bevan*, his attorney, and that in October last the same attorney had appeared for him in the Sessions court at *Limerick*, in a process between the parties in this case.

It is thus shown, that in 1837, the defendant was in this court by his attorney *Bevan*, and that so lately as October last, the relation of attorney and client subsisted, though in another court, between those parties.

Motion refused.

JOHN JONES Lessee of MOFFETT v.
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1841.
EXCHEQUER
OF PLEAS.
Friday,
January 29.

EJECTMENT on the title for recovery of the lands of *Towneyfortin* in the County of *Sligo*. The declaration contained but one demise, in the name of *John Moffett*, laid on the 8th January, 1840. It appeared in evidence that one *William Smith* had been before the year 1799 seized in fee of the premises in question, and that on the 21st of October, 1799, he executed a marriage settlement, limiting the land to *George Tarence* and *James Gilmor* as trustees, to the use of the said *William Smith* for life, and after his decease (subject to a jointure of £50 a year for his intended wife *Margaret Smith*) with remainder to the use of such child of the marriage as *William Smith* should appoint. There was no disposition of the ultimate reversion made by this settlement, and there was no issue of the marriage. By indenture made between *William Smith* and *Barton Smith*, dated 2nd May, 1820, *William Smith* “in consideration of love and affection to *Barton Smith*, his near relative, and in consideration of five shillings, conveyed the said lands of *Towneyfortin* to *Barton Smith*, his heirs, executors, administrators, and assigns in fee simple from and after the decease of the said *William Smith*, subject to the jointure of £50. The plaintiff gave in evidence a deed of the 12th of August, 1828, whereby *William Smith*, in consideration of £50 paid by *Richard Smith* to the said *William Smith*, conveyed the said lands of *Towneyfortin* to *Richard Smith* and his heirs, upon trust to pay the rents to the said *William Smith* during his life and after his decease (in case the said *Margaret Smith* should be then

Where A made two conveyances of lands for voluntary consideration, and the grantee of the second conveyance assigned to B for value, B shall avoid the former conveyance, under the 10 Car. 1, c. 3, Irish.

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living) to pay thereout to the said *Margaret Smith* and her assigns the yearly sum of £46 3s. 1d. being equal to £50 late currency subject thereto, with remainder to the said *Richard Smith* and his heirs. By indenture of the 12th January, 1830, between *William Smith* of the one part and the defendant of the other part, *William Smith*, for the alleged consideration of £500 sterling, expressed to be paid to the said *William Smith* by the defendant, and in consideration of the sum of £300 sterling secured by three bonds of the defendant in the penal sum of £200 each, with warrants of attorney for confessing judgment thereon, which said sums of money so paid and so secured as aforesaid were expressed to be "the consideration for the complete purchase of "the absolute estate of inheritance in fee simple," of the said lands; the said lands of *Towneyfortin* were conveyed (subject to the annuity of £50) by *William Smith* to the defendant, his heirs and assigns for ever. The defendant, immediately after the execution of this deed, got into possession of the lands, and so continued until the present ejectment was brought. In the year 1837, *Richard Smith* became bankrupt, and *James McCullagh* was appointed his assignee. On 26th March, 1839, the bankrupt's estate and interest in the lands in question, were sold by the Court of Bankruptcy; and the lessor of the plaintiff having become the purchaser, by indenture of the 15th May, 1839, made between the assignee of the bankrupt, the bankrupt himself and the lessor of the plaintiff, the said lands of *Towneyfortin* were conveyed to the lessor of the plaintiff in fee, for the sum of £480. *William Smith* died in January, 1840; and on his death, the present ejectment was brought. This case was tried at the last Summer Assizes for the county of *Sligo*, before Mr. Baron *Richards* and a special jury. It appeared upon the cross-examina-

tion of one of the plaintiff's witnesses, that the consideration of £50, alleged to have been paid by *Richard Smith* was merely colourable, and that no such sum had really been paid; also, that no demand of possession was made until after the day of the demise. The defendant's counsel contended, that he, having been a purchaser for £800, could not be turned out of possession, without a demand of possession having been made, and called on the learned Baron to nonsuit the plaintiff; but the judge allowed the case to proceed. Six issues were agreed upon by consent, and a verdict was returned for the plaintiff, subject to the special case. It was admitted, that the deed of 2nd May, 1820, was voluntary. The jury found that the deed of the 12th Augt. 1828, was not for valuable consideration, but was obtained fairly and without fraud. They found also, that the deed of 12th January, 1830, was not for valuable consideration, and was obtained fraudulently, on the ground that the consideration money mentioned therein, was not paid in money, or by the securities which were then given, and as intending to defeat the deed of the 12th August, 1828. They found likewise, that the deed of sale to the lessor of the plaintiff of 15th May, 1839, was for valuable consideration.

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The *Solicitor-General* now moved, pursuant to the leave reserved, that the verdict for the plaintiff be changed to a verdict for the defendant, or for a new trial. The plaintiff should have been nonsuited; for the defendant being in a purchaser for value, and put in by *William Smith*, could not have been dispossessed by *William Smith*, or any person claiming under him, without a demand of possession. [PENNEFATHER, B.—If both the deeds had been for valuable consideration, there would have been no

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demand of possession necessary, and so it would be, if they were both voluntary]. The deed of 1830 being found voluntary, and being subsequent to that of 1828, could not have priority over it. But the defendant gave in evidence another voluntary deed of 1820 to *Barton Smith*. So that there were three voluntary deeds; and the first of these, that to *Barton Smith* in 1820, should have priority. But the case made by the lessor of the plaintiff, in order to get rid of the deed of 1820 was, that as he was a purchaser for value from the grantee of the voluntary deed of 1828, the statute of Fraudulent Conveyances gave him priority over all voluntary deeds whatsoever. This is a question depending on the construction of the 10 *Car.* 1, c. 3, analagous to the English statute 13 and 27 *Eliz.* The proposition I contend for is, that *voluntary* conveyances, *as such*, are not affected by the statute; and that, though if a man make a voluntary conveyance, a purchaser for value, may avoid the voluntary deed, yet the person purchasing from the grantee of a voluntary deed, cannot claim against a prior deed merely voluntary, in which there has been no collusion or fraud. The first case which decided that a voluntary deed is void against a purchaser for value, though with notice of the prior deed, was *Doe v. Manning*(a). But the question here is, whether a purchaser for value from the grantee of a voluntary deed, is in the same position as his assignor, or in a different position from him. [PENNEFATHER, B.—The question was much discussed in *Warburton v. Ivie*(b) and a great deal of argument was used on the analogy of this statute]. In *Gilbert on Uses*, p. 312, it is laid down, that he who makes a gift fraudulent within the statute, must be

(a) 9 East. 59.

(b) S. & B. 134.

the same person who afterwards makes the conveyance for value; *Clerk v. Rutland*(a); *Jones v. Parefoy*(b); *Sugden on Estates*(c); *Bythewood's Conveyancing*(d). There is no distinction between a conveyance for valuable consideration by the grantee of a voluntary deed, and by the heir or devisee of the original grantor. If both deeds were executed by the same person, fraud may be fairly inferred; but it cannot be contended, that there is any intention to defraud a person, of whom the grantor of the voluntary deed never heard. If the contrary construction were to be put upon the statute, a voluntary family settlement might be set aside by a conveyance from the heir to a purchaser for value; for there is no distinction between a purchase from the heir, and a purchase from the grantor of the voluntary deed. There are two classes of cases, which will probably be relied on: the first is, that of *Smartle v. Williams*(e). The effect of that class has only decided, that the statute cannot be called in aid by a purchaser for value, against another purchaser for value; which principle is not applicable to this case. The next class is, that of *Burrell's case*(f). [PENNEFATHER, B.—I apprehend, that a conveyance without consideration, is fraudulent within the meaning of the statute, and that *Burrell's case* is in point. Are we not to hold it so, considering the authorities, especially *Doe v. Manning*? That is a broad determination, that every voluntary conveyance is fraudulent within the statute, but leaves untouched the question, whether the purchase should be from the same person or not. *Burrell's case* establishes that point, and the effect of both together is

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(a) Lane 113, Roberts, Vol. Conv. 386. (b) 1 Vern. 45.

(c) Vol. 3, p. 82.

(d) Vol. 8, p. 144.

(e) 3 Lev. 387.

(f) 6 Co. 72.

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against you. BRADY, C. B.—It is so, unless you can make a distinction between a purchase from the heir, and a purchase from the grantee]. Then it would follow, that a purchaser from the heir after, possibly, ten devolutions of the heirship, would avoid all the prior voluntary deeds upon the authority of *Burrell's* case. [PENNEFATHER, B.—A similar argument to that was used in the case of *Warburton v. Ivie*]. There is a difference between this statute and the registry act; the act against fraudulent conveyances is not directed at any cases that are merely voluntary. [BRADY, C. B.—All the modern cases show, that all previous voluntary conveyances are swept away, by the purchaser for value. PENNEFATHER, B.—Since the case of *Doe v. Manning*, the understanding of the profession has been so]. As far as I have discovered, there are no authorities, except *Doe d. Bothwell v. Merton*(a) But, at all events, we should succeed in setting aside the verdict, there being no evidence that the deed of 1830 was fraudulent.

Smith, Q. C. for the lessor of the plaintiff.—I admit, that as between the deeds of 1820 and 1828, the former conveyance to *Barton Smith* would have priority. But in the case of *Doe v. Manning*, in which all the authorities were considered, it was settled, that a purely voluntary deed, is fraudulent against a subsequent purchaser for valuable consideration. In *Warburton v. Loveland*(b), the House of Lords has acted upon the same principle.

M. Baker.—This point has been much discussed by Mr. *Jarman* and Sir *Edward Sugden*, and their opinion, as

(a) 1 N. R. 332.

(b) 2 Dow. & Clark, 479.

being that of the bar, is entitled to much respect; great mischiefs will ensue from the construction contended for^(a).

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BRADY, C. B.—The main question in this case is, whether the deed of 26th March, 1839, is sufficient to sustain the ejectment brought against the grantee of a prior deed, executed for a voluntary consideration. It is conceded by the counsel for the defendant, that if this conveyance had been executed by *William Smith* himself, *Moffett* would have succeeded. Indeed, the counsel for the defendant could not have contended the contrary against the series of decisions upon this act, which have established that a voluntary conveyance is to be deemed fraudulent, as against a subsequent conveyance for valuable consideration: that position is so well settled, that no Court could think of disturbing it. Then the question remains, whether, when the conveyance for valuable consideration is made by a party deriving under the original grantor, either as heir, devisee, or purchaser, the same effect takes place. As to a subsequent conveyance for valuable consideration by an heir, it has been decided two hundred years ago, that a person so claiming could defeat the prior voluntary conveyance, and *Burrell's* case expressly decides, that if a father makes a lease by fraud and covin of his land to defraud others, to whom he shall demise or sell it, and before the father sells or demises it he dies, and the son knowing or not knowing of the lease, sells the land on good consideration, the vendee shall avoid the lease by the act of 7th Eliz. I have not heard, during the argument, any case cited which has been decided contrary to that:

(a) 8 Byth Conv. 146, by Jarman.

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but whether or not, such has been the settled law since the time of James I. But this case does not rest on *Burrell's* case alone; but in *Doe v. Martyr*(a), the court followed up the same principle, and held that the title of a purchaser for a valuable consideration cannot be defeated by a voluntary conveyance, of which he had no notice. Again, Chief Justice Tindal, in *Warburton v. Ivie* adopts the same doctrine; and I cannot think that it was the opinion of the Judges of England, that *Burrell's* case had gone too far. It was the object of the Act to protect purchasers for valuable consideration; and I do not see why a purchaser for value should not be protected, whether he derives his title from the person who made the voluntary conveyance, or from a person claiming under him; and I have no hesitation in saying, that the lessor of the plaintiff has established his case, and that on this point this verdict should be sustained, and a writ of *habere* issue. The other grounds of the case were fully left to the jury, and I see no reason to interfere with the verdict they have found thereon.

PENNEFATHER, B.—It is admitted by the *Solicitor-General* and by Mr. *Baker*, who pressed us with the arguments of Mr. *Jarman*, that if the first deed be fraudulent, the second conveyance, though executed by a grantee to a purchaser for valuable consideration, must prevail against the first grantee; and it is argued, that fraudulent means what is so in the common sense of the word fraud, namely, something surreptitiously and improperly obtained. The case of *Doe v. Manning* decides (and not for the first time) that every voluntary deed, that is, every deed without

(a) 1 New. Rep. 332.

valuable consideration, is to be considered fraudulent within the meaning of this statute. The statute does not use the word voluntary, but it says that every conveyance executed by covin, shall be void as against purchasers for valuable consideration; therefore to bring the case within the statute, it must be fraudulent. It must be held upon the former authorities, that every deed executed without valuable consideration is fraudulent, and so it has been decided without regard to the estate of the person executing it. In *Burrell's* case it was so held. This case is supported by two other authorities. But if we want further confirmation, Chief Justice *Tindal* states, without hesitation, that a voluntary conveyance is void against a subsequent purchaser for valuable consideration, no matter from whom such purchaser deduces title; and he illustrates his argument upon the Registry Act by this Statute of Fraudulent Conveyances. Therefore it appears that the Judges considered that the question upon the Registry Act was to be considered as governed by the Statute of Fraudulent Conveyances. The facts of *Doe v. Martyr* completely presents this question, and it is to be collected from the decision that it was on those grounds the case was argued:—there Sir *Jas. Mansfield* decides the question on the broad principle that every conveyance is to be deemed fraudulent as against a purchaser for valuable consideration, although that purchaser takes derivatively and not under the original grantor. No judicial dicta have been cited to the contrary. The question has indeed been ingeniously argued by a learned gentleman, who has written an excellent treatise, but his opinion is not sufficient to weigh against what we find decided by the Judges of England. Text writers are apt to be led away by their fancies, but we should not be led away by any such ingenuity. I therefore consider this motion should be refused, and as I think, with costs.

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FOSTER, B.—It is unnecessary for me to add more to what has been stated, than that I concur in the opinions of my learned brethren.

RICHARDS, B.—I also concur in the judgment of the Court. The opinion I entertained at the trial has been confirmed by them, and it is not necessary to go further after what has been said. As to the grounds upon which a new trial is sought, the defendant relies upon an instrument founded on fraud; not only as under the Statute but as being actually fraudulent. I certainly was myself of opinion that this instrument was obtained in the year 1830, from a weak old man, and by gross contrivances for a very unworthy purpose; and so far as the application to set aside this verdict goes, I think it should be refused. On the other point, I would say this much, that the language of the Statute accounts clearly for the word “fraudulent” being used in several of the cases instead of “voluntary,” which we are more in the habit of using. I think, with great deference, the learned gentlemen have fallen into the mistake, that finding in several cases the word *fraudulent* used by the Judges, they meant to use it otherwise than as it is used in the Statute. In the Statute the word means *voluntary*; and I think it must be so taken in all the cases.

Motion refused, with costs.

BARON v. CONNELLY.

1841.

EXCHEQUER
OF PLEAS.

Thurs. Jan. 28.

THIS was an action brought to recover the sum of £4 6s. 8d., the amount of a subscription to the *Waterford Chronicle* newspaper. The declaration was filed in Hilary Term, 1838, and the defendant pleaded thereto. The plaintiff served several notices of trial, but afterwards withdrew them, and no further proceedings were effectually taken until last Trinity Term, when the plaintiff proceeded to trial. On notice of trial being served on the defendant's attorney, he sent instructions to defend the action to his agent in Dublin, who sent him a letter in reply, stating that there were a great number of records to be tried, and that it would not be necessary to send up the defendant's witnesses until further communication. No such further communications were made until after a verdict by default had been had for the plaintiff for £4 6s. 8d., the amount of his demand.

Where a notice of trial has been duly served and no defence is made, owing to want of preparation, and judgment is given for the plaintiff, the defendant will not be allowed to set aside the verdict, though the want of preparation was owing to the mistake of his attorney. *Semb.* There is no difference between the Irish and English practice as to granting a new trial in an undefended case.

It was sworn in an affidavit of the defendant, that he had gone to the office of the *Waterford Chronicle* in January, 1831, and there paid the full amount due to the plaintiff from the defendant, and that he never since had any dealings with the plaintiff. Another affidavit by a Mr. *Kenny* stated, that he, *Kenny*, had gone with the defendant on that occasion, and remained outside the door while the defendant was within, until the latter came out of the office with a written receipt for £4 6s. 8d.

F. Mac Donagh, on behalf of the defendant, now moved to set aside the verdict in this cause, offering to pay the

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costs. The facts here are undisputed, and we have a clear defence upon the merits. There were a great number of records in the list, and from the number of times that the plaintiff had served us with notices of trial, which he had afterwards withdrawn, the defendant's attorney did not like to incur the expense of sending his witness to *Dublin* until the last moment. The Court will grant a rule to set aside this verdict on these grounds; *Lee v. Joseph*(a); *Mort v. Fenwick*(b). The plaintiff has made no affidavit that the debt is actually due, but relies on the affidavit of his attorneys. In those cases in *England*, in which the Court have thought the smallness of the sum given a reason for not disturbing the verdict, there were no special facts. If *Twilt v. Cranley*(c) be cited on the other side, it is in some measure shaken by *Watson v. Reeve*(d), and still more by *Lee v. Joseph*.

Hatchell, Q. C., and *James Plunkett* on the other side— This motion cannot be granted unless the Court will violate a settled rule: That when a demand is under £20, and a verdict passes for the plaintiff, the Court will not grant a new trial in an undefended case; *Brown v. Ray*(e); *Hearne v. Samuels*(f). [BRADY. C. B.—The authorities are where a question has gone on both sides to the jury. FOSTER, B.—No doubt the rule is as you state it in *England*; is there a different rule of practice here?] It has always been so in the English authorities, and it is important that the practice should be settled here. It is a rule in *England*, that a party will not get a new trial in an undefended cause,

(a) 1 C. and P. 46.

(b) 2 Dow. B. C. 246.

(c) 8 B. Moo. 144. 1 Moo. & Sc. 229 S. C.

(d) 7 Dow. Pr. C. 127.

(e) 9 B. Moo. 519.

(f) 3 M & S.

unless the briefs have been given out at the previous trial. There must also be an affidavit of merits; and lastly, the sum given by the verdict must be over £20. These three requisites are necessary in *England*, and the practice should be the same here; *Attorney-General v. Waters(a)*. *Mac Donagh*.—In *Lee v. Joseph*, the briefs had not been given out, and we have an affidavit of merits. The receipt is lost. [RICHARDS, B.—Does he swear he lost it?] *Kenny* swears that he saw the receipt. We offer to pay the costs, so there is no injustice done to the plaintiff.

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BRADY, C. B.—The Court are of opinion, that in this case there has been an entire absence of preparation on the part of the defendant, but that it would be a dangerous precedent to let him in to set aside this verdict. If it is to be said, that after notice of trial duly served, a party, after a verdict against him may come in for this purpose, when the plaintiff, perhaps, is not in a condition for a new trial, I do not see how the Court could ever refuse a new trial. It really comes to this, that a defendant may try his cause when he pleases, and not when the plaintiff pleases. Looking to the danger of such a precedent as this, I think the motion should be refused. As to the difference that is alleged to exist between the English and Irish practice in cases like the present, I should be sorry to hold that the practice was different; but looking only to the conduct of this case, I think it would be a dangerous precedent to grant this motion. If injustice has been done to the defendant, it has been through his own default; yet, although the defendant cannot now be let in to disturb this verdict, it is a case of hardship. Therefore, though I

(a) Jones.

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think the motion should be refused, yet it should be without costs.

FOSTER, B.—I concur in the opinion of the Lord Chief Baron, though it is possible that injustice may be done by the course we adopt; but a contrary decision would set the practice of the court completely at sea. I hardly know in what case a new trial could be refused, if granted in this.

RICHARDS, B.—I fully agree that applications of this kind should not be granted but on special grounds. I foresee a good deal of mischief that would result, if a precedent of this kind were established; a defendant would be always watching the evidence, and be prepared accordingly to come forward. Though I concur in the opinion that such a practice should not be encouraged, yet if I saw that actual injustice had been done to the defendant, I would go as far as I could to rescue him. The case of the defendant is, that he paid the debt and got a receipt for the amount. Had he produced it now, it would have met the whole of the demand of the plaintiff, and it would have been against natural justice to allow this verdict to stand. I asked why this receipt was not produced, and the only answer is, that one person came to the door of the newspaper office, and remained outside, while the defendant went in and paid the debt. That receipt not being produced, I look on the case of the defendant with great suspicion, and I am of opinion that the motion should be refused. But the plaintiff has not come forward to say that there was any demand due; a circumstance which induces us not to give the costs of this motion.

Motion refused without costs.

LEWIS AND PRINGLE v. MEEHAN.

1841.
EXCHEQUER
OF PLEAS.
Mond. Feb. 1.

THOMAS O'HAGAN moved that the rule entered for judgment of *nonpros* by the defendant in this suit, the judgment and subsequent proceedings be set aside for irregularity, and that the money paid over under the execution be handed over or repaid to the plaintiffs. The *capias* in this suit issued against the defendant in the vacation after Trinity Term, 1839, returnable on the 31st October following. The defendant entered an appearance on the 18th November, 1839, from which time no proceedings were taken until the 18th November, 1840, when the defendant entered a rule for a *nonpros*. On the 23d December, 1840, the plaintiff's attorney served a notice on the defendant's attorney, cautioning him, that the judgment of *nonpros* was entered irregularly in violation of the 27th general rule, the cause having been out of Court before the rule was entered, and requiring him to have the judgment vacated on an undertaking furnished not to proceed thereon, or otherwise that application would be made to the Court to have the judgment set aside, with costs. The defendant, notwithstanding, entered judgment, and caused an execution to be issued for the costs of the proceedings, and had the same lodged with the sheriffs of *Dublin*, to whom the amount £4 15s. 9d., with 4s. 6d. for their fees had been paid. This judgment is irregular under the 27th general rule. The twelve months mentioned in that rule are to be reckoned from the return of the writ, not from the day of appearance. The word process must mean writ, and the process being returnable means the return of the writ. The English rule of Hilary, 1832, is the same as the Irish rule

The time when "process is returnable" in the 27th gen. rule means the return of the writ, not that of the appearance of the defendant.

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of 1834. And there are several English authorities on the subject. The Court called on *O'Hara*, contra—

An appearance was entered on the 18th November, 1840. Our affidavit states, that before the defendant's attorney entered the rule for *nonpros*, he was advised by the law officers of the Court that he would be correct in taking such proceedings, inasmuch as the appearance of the defendant was not then entered for a year, and that the defendant was not to be considered as out of Court until a year from the date of his appearance. It is the general opinion of the officers, that the 27th rule applies only to the plaintiff in a suit. The entering of such rule for *nonpros* would confer a benefit on the plaintiffs; for it would entitle them to declare against the defendant for four days from the date of the rule, and if the plaintiffs had declared within that time, the declaration could not have been set aside for irregularity. The appearance does away with the writ, and the declaration with the appearance. [BRADY, C. B.—If a plaintiff is out of Court, what jurisdiction has the Court to give judgment against him?] The practice has always been, that the rule should run from the entry of the appearance; *Savage v. Atkins*(a); *Devonshire v. Ronayne*(b) *Cooper v. Nias*(c). [BRADY, C. B.—The general rule formerly was in this Court as has been stated. RICHARD B.—The practice has been, that the defendant had twelve months from the appearance; that is a strong comment on the rule. FOSTER, B.—The Judges reviewed the English rules, and adopted many of them in our practice. There has been no decision on the subject, but the old practice

(a) 1 Hud. & B. 508.

(b) 2 L. R. N. S. 157.

(c) 3 B. & A. 27.

was repeated. PENNEFATHER, B.—If the plaintiff is out of Court you cannot have judgment against him ; he is an absent party ; and it is the general law of the land that there cannot be judgment against an absent party.] But the affidavit of the plaintiffs is irregular : first, it is not sworn that the debt is due ; and secondly, the affidavit is entitled in a cause which they say is out of court. [RICHARDS, B.—It is not out of Court for the purpose of setting aside an irregular order. PENNEFATHER, B.—You are estopped from saying that.]

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BRADY, C. B.—The attention of the Court being called to this rule, which has been framed in pursuance of an act of Parliament, the Judges have no alternative but to follow the rule ; and the English authorities show that the return day of the writ is the day from which the rule begins to run. Therefore the judgment must be set aside, and the sum levied must be paid back ; but under the circumstances of this case, we shall grant the motion without costs.

Motion granted.

O'CONNELL v. O'CALLAGHAN.

1841.
EQUITY EX-
CHEQUER.
Thurs. Feb. 4,

THIS bill was filed for payment of an annuity issuing out of certain lands, part of which had been let pursuant to order of the court by the receiver in this cause to *John Keane* from the 1st of January, 1840, for a period of seven years or pending the cause. On the 1st. December, 1840, a consent was signed by the parties in the cause that the bill should stand dismissed and the receiver be discharged. Mr. *W. D. Freeman*, on behalf of the plaintiff, now moved

The court deals with its tenants as tenants at will, and therefore where a tenant had been let into possession under the court for a term of seven years or pending the cause, the court will not grant an injunction to dispossess him without an affidavit as to the state of his crops.

1841. for an injunction against *John Kinnea*, that he might be
 O'CONNELL dispossessed of the lands which has been let to him.
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The bill is now dismissed and the suit at an end; consequently the tenant's interest has expired, and we are entitled to this injunction. [RICHARDS, B. Have you an affidavit whether there are any crops sown by the tenant in the lands he holds] ? It is not necessary, for he was aware that his tenancy had expired and had offered a sum of money for a new lease. Besides it is not the custom of that part of the country to sow crops before this period of the year.

PENNEFATHER, B.—We consider tenants under this court as if they were tenants at will, and therefore as being entitled to emblements; and when a cause is suddenly terminated we deal with them accordingly. You have not given the tenant notice that you would make this motion. RICHARDS, B.—We should require an affidavit as to the state of the lands whether sown or not before we could grant a conditional order in such a case as this.

Motion refused.

KNOX, Petitioner v. MARLEY, Respondent.

KNOX v. ARMSTRONG.

1841.

EQUITY
EXCHEQUER.
Sat. Feb. 16.

This was a petition under the 1 & 2 Vic. c. 109, s. 16. In a petition under 1 & 2 Vict. c. 109, s. 16, service of conditional order allowed on rate-payers when tithe rent charge payers could not be discovered.

It stated that *Francis Blake Knox* was seized in fee of certain lands, denominations of the townland of *Kilcahill*, in the barony of *Clare* in the County of *Galway*, containing 264 acres 2 roods 64 perches, reputed to have been in the parish of *Annadown*, and had been so seized for the last four years. That in 1818 the late *Francis Blake*, Esq. demised the said lands of *Kilcahill* to *John Cavenagh*, which lease was renewed in 1818 for three lives, and that previous to the applotment of the parish of *Annadown* by the Tithe Commissioners, the said *John Cavenagh* was accustomed to pay the tithe chargeable on the said lands to the rector of *Annadown*. That by the applotment made since the year 1832, the said lands were applotted under the denomination of *Kilcahill*, and are therein stated as being in the tenancy of the said *John Cavenagh*, and as containing 250 acres, and the same were made liable to the rent charge of £9 19s. a year, which was payable to the said Rev. *Richard Marley*. That the said lands had been from time immemorial, as petitioners were informed, considered to have been situated within the parish of *Annadown*, and the same were chargeable thereunder with the title thereof. That by an applotment made some time since the year 1832, by the Tithe Commissioners for the parish of *Kilmoylan*, the said lands of *Kilcahill* were also applotted under the denomination of *Kilcahill*, and mentioned in the said applotment to be tenanted and occupied by the said *John Cavenagh*, and to contain 200 acres, and that the amount of

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tithe composition charged thereon, was £15 a year. That it was impossible that the entire number of acres contained in the two applotments, could be contained in the lands *Kilcahill*, which contained but 264a. 2r. 20p. That the petitioner, *Cavenagh*, held no other lands from Mr. *Knox* than *Kilcahill*, in the parish of *Kilmoylan*, or *Annadown*, except a farm of 57 acres, called the *Quarter of Ambally*, in the parish of *Kilmoylan*. That petitioner, *Cavenagh*, never paid any money for tithe of the parish of *Kilmoylan*, nor was any claim made on account thereof, until after the applotment, under which the Rev. *Marcus Armstrong* demanded tithe or rent-charge, except that once in 1819 some cattle of *Cavenagh* had been distrained for vestry cess of *Kilmoylan*, which petitioner, at the time, paid, and afterwards recovered by civil bill process, afterwards affirmed at assizes. That Mr. *Armstrong* had commenced an action against Mr. *Knox* for the rent-charge in the Common Pleas, and had filed a declaration as of Michaelmas Term last. That for three years, or thereabouts, a sum of £64 had been paid in error to the Rev. *Marcus Armstrong*, and also that the Rev. Mr. *Marley* had been paid the rent-charge thereout for the parish of *Annadown*.

The petition prayed an order of reference to the Chief or Second, Remembrancer; and that in proceeding under such order, the petitioner might be at liberty to serve a copy, or copies, of the same, and of the first and subsequent summonses to be served thereunder, on the church-wardens of *Annadown*, and on twelve of the tithe-payers thereof, and that copies thereof might be posted on the several places for posting notices of road sessions, with liberty for the church-wardens and tithe-payers to appear on such reference, such services are

postings to be had and made ten clear days previous to proceeding before the Second Remembrancer under the said order; or such other proceeding as the Court should think proper, for the purpose of ascertaining for which of the said parishes of *Annadown*, or *Kilmoylan*, the said lands of *Kilcahill* had been rightfully charged with the tithe composition; and that this Honorable Court should declare that the said lands of *Kilcahill* had not been rightfully charged with the said composition for such parish of *Kilmoylan*, and should make such order for the amendment of the certificate and applotment of such composition, and of the entry of such certificate in the registry of the *Exchequer*, as to this Honorable Court should seem meet, and that the said lands of *Kilcahill* might be exonerated therefrom, and from all rent-charge substituted in lieu thereof by the statute 1 & 2 Victoria, c. 109, s. 16; and that in the mean time, and until the obtaining of the Second Remembrancer's report, and the final order of this Honorable Court thereon, the said *Marcus Armstrong*, and his agent, and his attorney, might be restrained by the injunction, or order, of this Court from proceeding in the suit at law, instituted in the Common Pleas, for the recovery of the said rent-charge alleged to be due out of the said lands, for the said parish of *Kilmoylan*. The petition was verified by affidavit. On the 4th of December, 1840, an order was made in this matter, that the cause should be set down for hearing the next Term, serving this order on all parties interested, a month previously.

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Mr. *J. H. Blake*, Q. C., and Mr. *Ruttledge* for the petitioners.—This is exactly similar to *Armstrong v. Pepper*(a).

(a) 2 Ir. Eq. Rep. 89.

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We have here served the order on the Rector of *Kilmoylan*, and the Rev. Mr. *O'Rorke*, who is the land agent and collector of the rent-charge of that parish, and on nine tithe-payers of that parish. It is sworn, that we cannot discover the church-wardens of that parish, and that the respondent, Mr. *Armstrong*, has refused to discover them. The Rector of *Annadown* has also been served; but it is sworn, that we are unable to discover the tithe-payers of *Annadown* and *Kilmoylan*, so as to effect service on twelve tithe-payers in each parish—but we have served twelve rate-payers. We will make further service if the respondent will furnish us with a list of tithe-payers, or specify whom they wish to have served. Mr. *Armstrong* should be restrained from proceeding in the action he has brought.

Mr. *Smith*, Q. C. for the Rector of *Kilmoylan*.—The petitioner has paid rent-charge down to the present time; and if there be any mistake, he, as proprietor of the lands, ought to have looked to the applotment, when it was made. My client ought not to be put to the costs of this reference; until the order shall be made for a new applotment, we have a right to receive the rent-charge from somebody; the petitioner ought to pay it up to the time of the new applotment, for the sum to be paid has been fixed by agreement, and comes under the 17th section of the Act, which provides for compositions so fixed. He must pay this, no matter what may be the result of the reference, as the applotment can only be altered prospectively.

Mr. *Bessonnet*, Q. C. for the Rector of *Annadown*.—These lands have been from time immemorial, considered as part

of the parish of *Annadown*; it is therefore hard, that we should be obliged to go into the office to sustain a point, about which there is no controversy. [RICHARDS, B.—The petitioners case is not, that the lands are not liable to rent-charge; therefore, as you are only brought into the office *pro formâ*, you can be at no expense. The proper course will be, to consider the costs hereafter; this is not the time to settle that question.]

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BRADY, C. B.—We will make the order of reference as prayed, but we cannot make an order *in invitum* on the Rector to compel him to stop his proceedings at law: that can only be done by agreement among the parties themselves.

RICHARDS, B.—We should embarrass ourselves very much, if we made any order as to the arrears: if we were to stop the proceedings, we should throw those arrears upon other parties not liable to them. I recollect we made no order with respect to the arrears in the case similar to this, which already came before this Court.

1841.

EXCHEQUER
OF PLEAS.
Saturday,
February 6,

JAMIESON v. FARRAN.

When A. executed marriage articles under seal, and it was thereby covenanted "by and between the parties" thereto that certain sums should be vested in trustees, upon trust to pay the interest to A for life, and after his death to pay the principal to his wife and children, and A got part of the money into his own hands, and applied it to his own use, the trustees may claim, in a creditor's cause, the amount against the assets of A as specialty creditors.

By articles of agreement dated 10th February, 179 executed previously to the marriage of *Thomas Leland*, now deceased, with *Catherine Franks*, it was recited that *Catherine Franks* was then entitled to a sum of £833 6s. 8d. late currency, charged upon certain estates in the County of *Limerick*, and that *Thomas Leland* had agreed to secure a jointure for *Catherine*, and to provide for the issue of the marriage, and had executed his bond to *John Leland* and *Thomas Cuthbert*, as trustees for the like sum of £833 6s. 8d.; and the articles proceeded in those words:—
 "Now these articles witness and it is hereby covenanted and agreed upon by and between the parties hereunto that the said charge so due and owing to the said *Catherine* as aforesaid, shall become vested in the said *John Leland* and *Thomas Cuthbert* and the survivor of them and the executors and administrators of such survivor for ever, subject however to the following uses, trusts, intents, and purposes, that is to say;—that the said *John Leland* and *Thomas Cuthbert* and the survivor of them and the executors and administrators of such survivor shall receive the interest of both the said sums, amounting together to the sum of £100 sterling per annum, and pay the same over to the said *Thomas Leland* during the joint lives of them the said *Thomas Leland* and *Catherine Franks*; and from and after the death of the said *Thomas Leland* pay over the said annual sum of £100 to the said *Catherine* in case she should survive him. It was then provided that the two sums of £833 6s. 8d. each should be to the use of the children of the marriage.

as *Thomas Leland* should appoint; in default of appointment, to the children in equal shares; and, in default of children, to be in trust for *Thomas Leland* his executors, administrators and assigns. The articles then contained the following covenant:—"And the said *Thomas Leland* doth hereby for himself, his executors and administrators, covenant, promise and agree to and with the said *John Leland* and *Thomas Cuthbert* in manner and form following, that is to say:—That he the said *Thomas Leland* will before the end of five years, from the date hereof, well and truly pay to the said *John Leland* and *Thomas Cuthbert* the amount of the aforesaid bond for £833 6s. 8d. to be by them laid out upon good and sufficient security for the purposes herein mentioned and expressed of and concerning the same; the interest thereof to be applied and disposed of in like manner as the interest of the said bond is hereby directed to be applied." The marriage took place in 1794. This bill was filed by the plaintiff's on behalf of themselves and the other creditors of *Thomas Leland*, for the purpose of administering his real and personal estates. On the 20th January, 1837, a decree to account was pronounced, and the second remembrancer by his report found that *John Leland* and *Thomas Cuthbert*, in the year 1839, had in their hands as such trustees a sum of £833 6s. 8d. Irish, part of the sum of £1666 13s. 4d. settled by the articles; and that *Thomas Leland* having applied for a loan of the sum of £833 6s. 8d. upon an assignment of certain mortgages and judgments then vested in him, and affecting the lands of *Shanagolden* in the city of *Limerick*, accordingly by indenture of the 1st of July, 1809, *Thomas Leland* assigned the same mortgages and judgments to *John Leland* and *Cuthbert*. The report further found that in 1831, after the death of *John Leland*, the sum of £833 6s. 8d. was

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paid off in discharge of the mortgages by the mortgagor to *Thomas Leland*, and that the mortgaged premises had been thereupon by indenture of the 1st of March, 1830, re-conveyed to the mortgagor by *Thomas Leland* and *Cuthbert* who joined in the usual receipt for the money, but the report found that this sum had been received by *Thomas Leland* alone, and had been applied by him to his own use without giving the trustees any new security; and the report further found that a sum of £997 4s. 2d. was due on foot thereof for principal, interest and costs; and that *John Cuthbert Kearney*, the representative of *John Cuthbert* who was the surviving trustee, was entitled in respect thereof to rank as a specialty creditor in the administration of the assets of *Thomas Leland*. To this report several exceptions were taken; the first of which was that *J. Cuthbert Kearney* was entitled to rank only as a simple contract creditor;—the case now came before the court on these exceptions.

The *Solicitor-General* for the general creditors.

Mr. *T. B. C. Smith*, Q. C., for the personal representative of the surviving trustee.

The covenant by *Thomas Leland* that this sum should be for the benefit of his wife and children constitutes a specialty debt; *Gifford v. Manly*(a). When a husband covenants by marriage articles that money should be laid out for the purposes of the settlement and then receives it, contrary to his agreement under seal, those entitled to it are specialty creditors; *Benson v. Benson*(b). [RICHARDS, B.—This is a covenant that money shall remain in the hands of certain trustees for certain purposes; and the question is, whether

(a) Ca. Temp. Talb. 108.

(b) 1 P. Wms. 159.

Mr. *Leland* having received this money himself, did not thereby break his covenant]. But the document of 1st March, 1830, makes my client a specialty creditor. The receipt for the mortgage money is a distinct acknowledgment under seal of *Thomas Leland* and *John Cuthbert Kearney*, that they had received this very sum ; and this, taken in conjunction with the finding that Mr. *Kearney* did not receive any part of the money, comes within the authority that an acknowledgment under hand and seal makes the party to whom the debt is acknowledged a specialty creditor. The money is ear-marked, and was distinctly clothed with a trust ; *Mavor v. Davenport* (a) ; *Turner v. Waldron* (b).

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Mr. *J. Radcliff* on the other side. There is no case in which a *cestui qui trust* getting the trust money for a time into his possession has been held a specialty creditor ; an action of covenant could not be brought on these articles.

PENNEFATHER, B.—As a general principle, equity follows the law, and inquires whether an action could have been brought ; but in many cases where persons are beneficially interested they have a right to come in and enforce an agreement. *Thomas Leland* agreed under seal with his wife and unborn children, that this money should be for their use, and afterwards in direct contravention of these articles, got the money into his own hands and applied it to his own use.

Exception overruled.

(a) 2 Sim 227.

(b) 7 Sim. 80.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER

IN IRELAND,

IN EASTER TERM, 1841, AND THE SITTINGS AFTER

GARSTON v. WILLIAMS.

1841.

EXCHEQUER
OF PLEAS.

Mon. April 19.

Where several sequestrations in different causes had been obtained against a defendant, and an order obtained in one of the causes that the sequestrator should account; the sequestrator, who had accounted before the officer of the Bishop's court

of K., at first declined to account before the officer of this court; but afterwards proposed to take the opinion of the officer of this court, whether he could pass his account in this cause separately, and offered to pass a consolidated account in all the causes. Ordered that the officer should take the account, having regard to the accounts in the other causes, which should be taken as proper accounts, with liberty to the defendant to surcharge and falsify.

Although a sequestrator has accounted before the Bishop's Surrogate, he may be ordered to account before the officer of this court.

In Hilary Term, 1838, a Judgment was obtained by the plaintiff against the defendant, the Rev. *H. Williams*, for the sum of £59; on which a sequestration had issued. Some prior sequestrations had been obtained against the defendant, by other creditors, which had been since paid by the sequestrator, in this and the other causes, Mr. *Erskine*. An order of this Court had been obtained that the sequestrator should account; and on 28th November, 1840, a notice was served on Mr. *Erskine*, pursuant to that order, requiring him to lodge his account, as sequestrator, within

a week. A notice was served by him in reply, declining to account before the officer of the Court of Exchequer, but stating that his account had been passed and filed in the Consistorial Court of the diocese of *Kilmore*, and offering to attend before the Surrogate of that diocese, to discuss the account. On the 16th December, 1840, another notice was served on Mr. *Erskine*, apprising him that proceedings would be taken by attachment, to compel him to account; and on the 2nd of January, 1841, a notice, in reply to the last, was served by Mr. *Erskine*, offering to attend before the officer of the Court of Exchequer to take his opinion whether he could pass his accounts in this cause before the officer, separately from those in the other causes; and offering to pass, at the plaintiff's expense, a consolidated account of the sums received in all the several causes. On the 13th of January last a conditional order for an attachment, entitled in the cause, had been obtained against Mr. *Erskine*, the sequestrator, for not accounting; which *Bennett* Q.C. now moved to make absolute.

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Bennett—Several accounts were passed in respect of the several sequestrations against the defendant in the court of the Bishop of *Kilmore*. The sequestrator now says this cause is out of court, because that he paid the plaintiff in this cause his demand and had satisfaction entered on the judgment-roll. But a party cannot get rid of his liability by getting satisfaction thus entered. This case depends upon the question whether the order to account was a right order, which we contend it was; *Waldron v. Garrett*, (a) *Baker v. Swayne*, (b).

(a) 1 Jones & Cár. 69.

(b) Ib. 231.

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T. B. C. Smith, Q.C. and *Gayer* for the sequestrator. The surrogate is the proper officer to take these accounts; as being the officer of the Bishop. The Bishop is the person responsible to the creditor, as appears by the case of *Darby v. L'Estrange*, in the *Queen's Bench*, (a) The sequestrator enters into the usual bond to the Bishop to account in the Bishop's court; and the surrogate is the person before whom to pass the account. The ordinary course would be that the sequestrator should account in the five consolidated causes. [BRADY, C.B.—I do not see that we have authority to make that order: the causes are possibly in different courts.] The Court will not exercise its jurisdiction over a sequestrator who has passed his account before the person to whom he was responsible. This is an order calling on him to account *ab initio*. [FOSTER, B.—Sequestrators have constantly been in the habit of accounting before this court: have you any instance of a sequestrator refusing to do so?] No; but there is no instance where a sequestrator has been forced to account where he has already done so. 3 *Burn's Eccl. Law*. "Sequestrator," 341. Sequestration refers not to arrears, but to future profits only, *Egan v. Heenan* (b).

Bennett, Q.C. in reply. The only difficulty is with respect to the accounts of the other sequestrations.

BRADY, C.B.—The order the court feel disposed to make is, that the officer should take the account as directed by the order of the 24th November, 1840; and that in doing so he shall have regard to the other accounts in the

(a) *Batty*, 472.

(b) 1 *Flanagan & Kelly*, 39.

other causes, in which this gentleman has been sequestrator, and that these shall all be taken as proper accounts, with liberty to the defendant to surcharge and falsify as he may be advised. The sequestrator here has by his notice placed himself in a condition to account before the officer of this Court.

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RICHARDS B.—Though it is rather out of the ordinary course, the court has been in the habit of making orders directly against the sequestrator for the ease of the Bishop.

FOSTER, B.—The court on this occasion is only abiding by a practice from which they have never departed.

Order absolute accordingly.

CASH and Another v. TREVOR.

ASSUMPSIT on a promissory note :—verdict for the plaintiffs.

Brewster, Q. C. applied on behalf of the defendant that the plaintiffs might be disallowed their costs in this cause, pursuant to the statute 43 Geo. III. c. 140, they having overmarked the writ, and held the defendant to bail in a larger amount than was recovered by the plaintiffs by the verdict in this action; and that the defendant be allowed

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OF PLEAS.
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An application
under the 43
Geo. III. c. 140,
for over-mark-
ing a writ,
cannot be sus-
tained, unless
an *actual ar-*
rest has taken
place, a mere
holding to bail
is not of itself
sufficient.

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v.
TREVOR.

his costs of defending this action(a). It appeared that on the 13th December, 1839, the defendant gave to the plaintiffs his promissory note for £82 18s. 9d., which fell due on the 23rd of April last. On the 6th April, the defendant wrote to the plaintiffs a letter, enclosing, as a provision for this note, and also for the sum of £1 17s. 8d. previously due, two promissory notes, each for one-half the amount, the one payable at two months, and the other

(a) As the form of the notice may be useful to practitioners, it is here subjoined :—

William Cash & H. J. Ledgan,
Plaintiffs.

James Trevor,

Defendant.

IN THE EXCHEQUER OF PLEAS.

SIR—Counsel on behalf of the defendant will on Tuesday next, or the first opportunity after, move the Court

that the plaintiffs be disallowed their costs in this cause, they having over-marked the writ, and held the defendant to bail in a larger amount than was recovered by the plaintiffs by the verdict in this action, or than they had a right to do. And that the defendant be allowed his costs of defending this action, when the same shall have been taxed and ascertained, (undertaking to do so in ten days,) and that the same shall be a set-off against the plaintiffs' verdict for so much thereof as the same will amount to. And in case the defendant's costs exceed said verdict, that the defendant may have the surplus against the plaintiffs, and be at liberty to enter judgment and issue execution for the same; which motion will be grounded on the statute in that case made and provided; the plaintiffs' affidavit to hold the defendant to bail; the attested copy of the marked writ, which issued in this cause, with the return thereon; the bail bond to the sheriffs; the attested copy of the special bail-piece; the defendant's promissory note for £41 17s. 7d. due the 9th of June last, and the promissory note the subject matter of the action; the affidavits of the defendant's attorney, and the joint-affidavit of the defendant and F. G. (with the documents in the said several affidavits referred to,) this day filed in the proper office; the verdict had for the sum of £43 3s. 10½d.; with the pleadings. And you are hereby required to bring with you and produce, on the said motion, the defendant's letter to the plaintiffs of the 29th May last, which was given in evidence on the trial in this cause; together with the promissory note in the declaration in this cause mentioned, and Counsel will also apply for the costs of this motion.—Dated this 16th day of February, 1841.

G. WYBRANTS, *Defendant's Attorney.*

To Mr. W. P.

Plaintiffs' Attorney.

at three months after date. On the 20th April the plaintiffs wrote a letter to the defendant, rejecting the two promissory notes as payment, and returning the note at three months ; but stating that they would take the note at two months as part payment, and requiring cash for the balance ; to which letter was subjoined an account, whereby it appeared that there was a balance of £42 12s. 6d. then due to the plaintiffs on the note for £82 18s. 9d. On the 25th of April the defendant wrote to the plaintiffs that he would send indorsements for the balance at foot of their letter ; to which on the 27th April the plaintiffs replied, that they were at a loss to understand the defendant's meaning ; that the note for £82 18s. 9d. was the only over-due note of the defendant in the plaintiffs' hands, and that they had put the case into their attorney's hands. On the 13th May, 1840, before the note at two months had become due, the plaintiffs lodged with the sheriffs of the city of *Dublin*, a writ against the defendant, marked for the sum of £82 18s. 9d., to which writ the defendant gave bail (without being actually arrested,) on the 13th May, to the sheriff ; the defendant subsequently was obliged to put in bail at bar. On the 29th of May the defendant wrote to the plaintiffs to know whether the note for £41 17s. 7d. had been negotiated. To this inquiry no answer was returned ; but that note was afterwards presented for payment by the plaintiffs' agent, but not on the day when it became due ; in consequence of which the defendant referred the plaintiffs' agent to his attorney. On the 2nd November the amount of that note, with interest, was tendered by the defendants agent, and refused. On the 28th November, 1840, the cause came on to be tried before the Lord Chief Baron, who left it to the jury to say whether, under the circumstances of the case, the note at two months

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v.
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had been taken by the plaintiffs as part payment of the £82 18s. 9d. The jury found for the plaintiffs for £43 odd, being the balance of £82 18s. 9d. after deducting the amount of the note at two months; and on the 1st December, the plaintiffs' attorney was paid all demands which the plaintiffs had against the defendant, including the promissory note for £41 17s. 7d., except the amount of the verdict.

Brewster, Q. C. and Whiteside. The plaintiffs obviously overmarked the writ, as the original note for £82 18s. 9d. was partly discharged by the amount of the subsequent note at two months, which the plaintiffs had by their letter of the 20th April agreed to accept. The fact of the defendant having been held to bail, is sufficient to entitle him to succeed on this motion under the statute, the plaintiffs having held him to bail for an amount which, from their own statement of the account, appears to be more than was actually due. This point was before the court in *Day v. Picton*(a). Malice is not a necessary ingredient in a case, to bring it within the statute, *Cullen v. O'Brien*(b). The attested and compared copy of the sheriff's return states that an arrest has been made: the defendant's affidavit states the issuing of the warrant, and that he was forced to give bail at bar. That, coupled with the sheriff's return, is sufficient evidence of an arrest; and the fact of his being arrested is not denied on the affidavit. [PENNEFATHER, B.—The act does not require that the party shall swear that he was arrested; that he may verify to the court. One of the documents on which he relies is the sheriff's return, and that is *prima facie* evidence of an arrest.] Even if there were no

(a) 10 B. & C. 120.

(b) 3 Ir. Law Rep. 255.

actual arrest, there might have been an arrest in law.
Wilson v. Broughton(a); *Edwards v. Jones*(b); *Reynolds v. Matthews*(c).

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Holmes, with whom was *Sheil*, contra.—It is admitted, that in order to bring a case within the statute, it is not necessary there should have been an over-marking, from malicious motives; but the note for £82 was not paid when the writ was marked: the plaintiffs have sworn they had taken another note for £41 17s. 7d. on the terms of the defendant remitting the balance in cash; he has not done so; and the plaintiffs therefore looked upon it that the arrangement they proposed was at an end, though they did not return the note. [PENNEFATHER, B.—The taking of negotiable security suspends the right of action.] Yes; but that note was never accepted as a security, but only conditionally. [PENNEFATHER, B.—There is, in the letter, an unequivocal acceptance of one bill, and a claim to be paid the balance in cash on the security of the original bill, after allowing for the bill which the plaintiffs kept.] Then the question is, whether a debt they being fairly due, when the defendant did not send cash, had not legal and probable cause to mark a writ for the original debt. On these grounds, this would not be a case within the statute. But again, there was no actual arrest, and in order to come within the statute, there must be an actual arrest as well as a holding to bail. *Silverides v. Rowley*(d); *Donlan v. Brett*(e); *Day v. Picton*(f); *Berry v. Adamson*(g); *Amor v. Blofield*(h); *Bates v.*

(a) 2 Dow. Pr. Cas. 641.

(b) 2 Mee & W. 414.

(c) *Wilmore, Wallaston & Hod.* 425. (d) 1 Moore, 92.

(e) 10 B. & C. 117.

(f) 1b. 120.

(g) 6 B. & C. 528. 9 D. & Ry. 558. S. C.

(h) 2 Moo. & Sc. 156; 9 Bing. 91. S. C.

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Pilling(a). [PENNEFATHER, B.—It has been held in some cases, that it is enough if a party be arrested, and is unable to put in bail, so that in these cases the statute has been read in the disjunctive.] The authorities are all considered in *James v. Ashew*(b), in which the necessity of an actual arrest is held. The sheriff's return is a matter of course; it is always *cepi* when a man is holden to bail, and being a mere formality, is no evidence of actual arrest, in the absence of any allegation of that fact.

BRADY, C. B.—The Court are all of opinion that this motion must be refused. Had it rested on its merits only, their opinion might have been different; but it is plain on all the cases that an actual arrest must take place. It lay upon the defendant to show that he was arrested; he ought to have brought himself within the words of the act; but he has not stated any facts to show to the Court that he actually was arrested; he has relied on a formal return of the sheriff, which cannot be evidence sufficiently satisfactory of that fact. The motion therefore must be refused; but the case is not one in which the costs of this motion will be given(c).

Motion refused, without costs.

(a) 2 Cr. & Mee. 374.

(b) 8 Ad. & E. 351.

(c) Vid. *Tuthill v. Bridgman*, ante p. 132, and *Bennett v. Burton*, 1 Gale & Dav. 57.

PUJOLAS v. HOLLAND.

1841.

EXCHEQUER
OF PLEAS.

Tues. Apr. 20.

TRESPASS by an apprentice against his master, for an assault and battery, plea; general issue. At the trial of this case at the last spring assizes for the Co. of *Tipperary*, before Mr. Justice *Perrin*, a Mr. *Thwaites* was produced as a witness for the plaintiff, who was asked on his cross-examination, whether the plaintiffs had stated to him, that the defendant had beaten him (the plaintiff) for having had improper connexion with a young girl M. A. C, his fellow apprentice? It was objected by the plaintiff's counsel that such evidence could not be offered in mitigation of damages upon the issue joined between the parties; and the learned judge rejected the evidence. It also appeared, from the testimony of the same witness, that he had already given evidence on a criminal trial of the defendant; and had sworn depositions relative to the defendant which the witness had afterwards requested the clerk of the peace for the City of *Limerick* to alter; and on the witness being asked, with a view to impeach his credit, what such alterations were, it was objected that the depositions themselves ought to be produced before the witness could be cross-examined as to the contents of them. The judge ruled accordingly. The jury found a verdict for the plaintiff for £400, and *Dwyer* now moved for a new trial on the ground of the erroneous ruling of the judge on these two points.

Trespass by an apprentice against his master for assault and battery. Plea not guilty. The defendant cannot, at the trial give, in mitigation of damages, evidence of an admission by the plaintiff that his master had beaten him for misconduct.

A witness who had sworn written depositions on a former occasion, in which he afterwards made some alterations, cannot be cross-examined as to those alterations without producing the depositions.

Hatchell, Q. C. and *Brewster*, Q. C. contra. What might have been pleaded in justification, cannot, on the sole plea of not guilty, be offered in evidence, even in

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mitigation of damages. It may be said that what takes place at the commission of an assault may be given in evidence as part of the *res gestæ*, but this is not the cross-examination of a person who saw the blows inflicted; for the object is to extract from his evidence an admission of the plaintiff, that his own conduct had been such as to render the beating given him justifiable as correction. [PENNEFATHER, B.—Suppose the plaintiff had been caught in the act of impropriety, would that be admissible in evidence?] It would not. If the defendant had pleaded that he had corrected the plaintiff for misconduct, then it would be a question whether the correction was excessive; but evidence of the misconduct of the plaintiff at the time when the beating was inflicted cannot be given, unless such a defence is put upon the record. *Watson v. Christie*(a), is precisely in point, and the ruling of Lord Eldon at the trial was confirmed by the court.

As to the second objection, an attempt has been made here to discredit the witness by showing that he had before made a statement inconsistent with what he swore on the table; but evidence cannot be given of the contents of a written document without producing it; and the witness should have an opportunity of showing all that he had said before. The *Queen's Case* (b), raised the very point. [PENNEFATHER, B.—It appears to me that the answer of the judges and the decision of the House of Lords as to this point in the *Queen's case* is quite general, and independent of the particular case then in discussion. BRADY, C.B.—That decision is that the witness may be asked if he wrote a particular line, but if you go on to examine him as to

(a) 2 B. and P. 224.

(b) 2 B. & B. 286.

the contents of a letter, the letter must be produced and put into the witnesses hand.]

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Bennett, Q.C.—If the defence attempted to be given in evidence was such as might be pleaded in justification, it cannot be made on the trial; but here the defendant could not have pleaded in justification that he had beaten the plaintiff for his impropriety: such a plea would have been demurrable. [PENNEFATHER, B.—If the master had given him a few blows and pleaded that he gave him moderate chastisement, that would have left open the question of excess, and the plaintiff might reply an excess.]

Matter of provocation which cannot be pleaded in bar may be given in evidence, *Cooke v. Bertie*(a); 2 Star. Ev. 254.

As to the other point the rules of evidence have not been infringed, for the depositions were not in the possession of the defendant, and could not be produced. [PENNEFATHER,

B.—Suppose a witness to be produced who had been guilty of perjury; you must produce a copy of the record of his conviction before you can exclude his testimony. There is but one exception to this rule, that is the case of an examination on the *voir dire*: there if the witness mentions that he has an interest, you may examine him as to what it is. BRADY, C.B.—Are we not concluded by the *Queen's Case* from examining into this point?] It is laid down in

Starkie on Evidence that the question is still open. [PENNEFATHER, B.—That is manifestly a mistake. BRADY,

C.B.—We have looked at the determination in the *Queen's Case* and think the answer given by the judges is quite general as to a former written representation on the same matter. The invariable practice in criminal cases is to

(a) 12 Mod. 232.

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give the depositions into the hands of the witness]. That is because the depositions are in court.

BRADY, C.B.—We are all of opinion, that this motion should, on both grounds, be refused. The first question in order of time, though the last argued was, whether Mr. *Thwaites* could be asked as to the alteration of depositions he had sworn, which were not put into his hands ;—now, according to the settled law, a witness cannot be cross-examined as to the contents of a written document without producing it. Whatever difficulty there may be in doing so, such documents must always be produced ; unless by any fatality a document is lost or destroyed or is in the possession of the opposite party ; in such case the party may interrogate about it, but otherwise the attempt is never made. Supposing the witness to answer the question, how is he to be contradicted ? Unless the document be produced it must be by a witness giving evidence of its contents, which would be inadmissible as long as the document itself was in existence or could be produced : I am therefore of opinion that this question was properly rejected. With regard to the second question, namely, whether the plaintiff had not by his misconduct given authority to the defendant to correct him :—the ordinary way is to plead in justification, and leave the plaintiff to reply an excess ;—the case then comes thus before the jury. But here that question is not raised upon the record, and I do not think evidence can be given of it. My mind is very clear upon this point of the case.

PENNEFATHER, B. concurred with the Lord Chief Baron. One question depends on this, that as the party impeaching the witnesses testimony, could not have intended to rely on

what the witness had before stated in writing, he should be allowed at the trial, to give parol evidence of the former statement, to contradict that which the witness then made. It appears that proposition was not maintainable; that the grounds of the decision of the House of Lords are general, and that their decision accords with what is the general law of the land, and had been so for years before. Then as to the other question first argued, I take the rule to be that if the matter relied on, may be a justification of a *trespass*, though not of this particular trespass; (because this particular trespass may have exceeded the amount which would be justifiable); the party must reply excess, and that defence must be made on the pleadings. It has not been so made here, and I think therefore, the testimony was properly excluded.

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FOSTER B., and RICHARDS, B., concurred.

Rule refused.

GILLESPIE v. CUMMING.

1841.
EXCHEQUER
OF PLEAS.
Tues. April 20.

TRESSPASS *quare clausum fregit*: Plea, *liberum tenementum*. Replication, a demise for two years, from the defendant to the plaintiff; on which issue was joined.

Where a defendant in an action of trespass *qu. cl. fr.* has brought a cross-action of the same nature for the same transaction against the plaintiff and his servants, who were witnesses

At the trial of this case at the assizes for the county of Monaghan, before Mr. Justice *Torrens*, the plaintiff pro-

of the fact, such servants are not thereby rendered incompetent witnesses for the plaintiff in the first action.

A verdict in a civil action cannot be given in evidence by the mere production of the *postea*; but the judgment must be produced.

Semb. Otherwise in a criminal case.

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duced two of his sons as witnesses to prove the trespass alleged, and an objection was made to their competency on the ground that the defendant had brought another action of trespass against the plaintiff and his said sons, in which the same question was raised as in the principal case. In that action the sons had justified under their father's possession. Both actions were on the list of records to be tried at the same assizes; but the second action was never tried. The evidence of the sons was admitted. The jury found a verdict for the plaintiff; and the learned judge having reserved leave to move to set it aside, if the court should be of opinion that the evidence should not have been admitted, a conditional order had been obtained on a former day to set aside the verdict, against which

Holmes and Tomb, for the plaintiff, now showed cause. The cross-action has been a mere device to deprive the plaintiff here of the benefit of his witnesses testimony by making them co-defendants. Were this objection allowed to prevail, it would establish the possibility of any person depriving an opposite party of the testimony of his witnesses, by bringing an action which it was never meant to try. No judgment had ever been given in the other action, and there is no case establishing that so remote a possibility as the mere bringing of a cross-action is such an interest as to exclude the testimony of a witness. A mere possibility of interest does not exclude testimony, *Simpson v. Pickering*(a). As the law now stands, the names of the witnesses, even if incompetent, might be indorsed on the record, and the case would then be tried(b). [PENNEFATHER, B.—At the time the alleged trespasses

(a) 5 Tyr. 143.

(b) See 3 & 4 Vict. c. 105, ss. 51, 52.

were committed, those two witnesses had no interest at all, but it is urged that they are made incompetent by the subsequent act of the person against whom their testimony was to be used—namely, the bringing of an action.]

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R. Andrews and *Whiteside* contra. Both these actions were ready for trial at the same time, and our's was the first case entered on the list; but Mr. *Holmes* applied to the judge to try his case first. Nothing turns on the fact of judgment, not having been given or made up; for even in a criminal case, the verdict in another case would have been admitted in evidence at the same assizes, though the verdict had not been made up. [PENNEFATHER, B.—It was so decided in *Hardy's* case, and *Tooke's* case, in the High Treason Trials in 1792; but I do not know that it follows from the cases of High Treason that the verdict in a civil case, at *nisi prius*, could have been given in evidence until the judgment was made up. FOSTER, B.—*Non constat* that it will be a judgment at all. PENNEFATHER, B.—There is this distinction, namely, that the judgment in a criminal case may be entered immediately after verdict, but it cannot be so in a civil case.] The getting a writ first out of the office is not to defeat a just cause; here we have brought an independent action, and the lands are confessedly the property of the defendant. [PENNEFATHER, B.—I think this question must be argued as if you had brought no action at all; the point is, whether a mere liability to action is such an incompetency as disqualifies a witness.] The authorities are quite clear that such testimony must be excluded. *Kinnersley v. Orpe*(a); *Strutt v. Bovingdon*(b); *Hancock v. Walsh*(c).

(a) 2 Doug. 517.

(b) 5 Esp. 56.

(c) 1 Star. Rep. 347.

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 v.
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In *Doe v. Tyler* (a), Lord Chief Justice *Tindal* has stated the principles which exclude a witness by reason of interest, which are quite applicable here. A verdict against one under whom a defendant claims, is evidence against that defendant. 12 *Vin.* 136. 4 *Com. Dig.* "Evidence," A. 5. [PENNEFATHER, B.—The sons justify as the father's servants, but without claiming any interest under him. No man could ever prove his case, if all his servants who justify under him may be made defendants in an action, and that that liability is to exclude them.] The verdict would have been given in evidence against us, for a verdict may be given in evidence, though the judgment has not been made up. [PENNEFATHER, B.—I think you will find the contrary has been decided.] The record, in a criminal case, when made up, is evidence. *Long v. Codrington* (b), *Peake's Evidence*, 41. The judgment in the preceding ejectment is evidence in an action of trespass for mesne profits. *Doe v. Whitcombe* (c). It has been ruled by Lord *Kenyon* that the production of the postea was conclusive evidence of the extent of the demand. *Garland v. Schoones* (d). [PENNEFATHER, B.—That last case is overruled by a decision made this year by the House of Lords in *Malone v. O'Connor*, on an appeal from Lord *Plunket*.]

BRADY, C. B.—We are all of opinion that the judge acted rightly in admitting this evidence; and that there was nothing in the fact of another case having been brought down for trial at the same assizes in which the witnesses were defendants, which precluded their testimony in this case. They were not produced as claiming any

(a) 4 Moo. & P. 29.
 (c) 8 Bing. 46.

(b) Hayes, 76.
 (d) 2 Esp. 647.

interest in the lands in question ; or as supporting a verdict which could be of any use to them on a future proceeding, but as the only persons who could be produced to prove the plaintiff's case against the defendant. Under those circumstances it would be a strong thing to exclude their testimony ; and it would tend to defeat a great many actions, if a servant could not be produced to prove an injury done to his master's property, because he may be made a defendant in another action. *Lord Hardwicke's* judgment in *The King v. Bray(a)*, referred to in *Phillipps on Evidence*, p. 116, confirms this principle. It appears to me, then, that the mere liability to an action being brought against the servant, cannot be set up as an objection to his competency, where he himself claims no interest in the lands, the subject of the action in which he is produced. Here, however, it is said that an action has actually been brought, and a plea put in by the servant, justifying under the possession of the principal defendant ; but that action has never been tried ; and the consequence of admitting that to exclude his evidence would be, that in cases like this, an action would be brought against all the servants for the mere sake of having an action pending against them. In this case the verdict could not have been given in evidence, and thus exclude their testimony, because no verdict can be given in evidence, as conclusive of any fact, until converted into the solemn judgment of the court above. The authorities referred to by Mr. *Phillipps(b)*, are very clear that the production of the postea is not sufficient, and that it should be shown that the verdict had been followed by judgment. We, therefore, all think that the rule for a new trial must be

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(a) Rep. Temp. Hardw. 344.

(b) Phillipps' Ev. 389.

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refused. No authorities bearing exactly on this point have been cited; but we should extend the rule of exclusion farther than is requisite for the purposes of convenience or propriety, if we were to hold that this evidence should have been rejected.

The rest of the court concurred.

Cause allowed, with costs.

1841.
 EQUITY
 EXCHEQUER.
 Sat. April 24.

TRISTRAM Petitioner, HARTE Respondent.

Where in an affidavit by the respondent in a petition for a receiver on a judgment, he denied that the sum claimed by the petitioner was due, but said that the entire sum due, on foot of the judgment, &c. is £474 8s., besides costs, which this deponent is advised he was not liable to;—it was held that he was thereby precluded from insisting on the statute of limitations as a bar to the full amount of that sum.

THIS was a petition for a receiver, under the 4 & 5 Wm. IV. c. 55, by a creditor by judgment on a money bond for the penal sum of £553 19s.

Mr. *Walter Bourke*, for the petitioner, moved that the remembrancer's report in this matter should be reviewed, he having, in reporting the sum due on the judgment, against the defendant, vested in the plaintiff, allowed only six years' interest on that judgment. The judgment was obtained on a bond in Easter Term, 1816; the conuzee died in 1822, having appointed his wife his executrix, who revived the judgment in 1830. In November, 1835, it was assigned to the petitioner, *Tristram*, who revived it in 1836, and then filed this petition for a receiver. On this petition a condi-

Per Foster, B.—This affidavit was a sufficient acknowledgment in writing, within the 3 & 4 Wm. IV. c. 27.

an order was made, on the 2nd November, 1836, which resisted on behalf of the respondent, by an affidavit the respondent filed as cause, in which he denied that entire amount was due on the judgment, but said at the entire sum due by deponent, on foot of said judgment, is £474 8s. besides costs, which this deponent advised he is not liable to." He did not rely on statute of limitations. On the 18th of May, 1839, order of reference was made to the remembrancer, to enquire and report what sums were due on the judgment; the remembrancer, by his report, dated 28th January, 1841, found that there was due for principal, a sum of £246 19s., subject to a deduction of £20 16s. 2d.; and interest for six years previous to the date of the conditional order, £88 12s., together with four and a half per cent interest, from the date of the conditional order to the date of his report. The total amount allowed by the remembrancer, as due on the judgment, being £405 9s., the respondent's currency, which was less than the sum admitted by the respondent to be due in his affidavit to resist the conditional order.

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Mr. Bourke.—The principal contended for is, that even if the judgments were within the statute of limitations, yet the admission in the affidavit of the respondent (assuming the judgments are within the 42nd section(a),) comes

3 & 4 Wm. IV. c. 27, sect. 42. " And be it further enacted, that after the 31st day of December, 1833, no arrears of rent, or of interest, in respect of any sum of money charged upon or payable out of any land or tenement, or in respect of any legacy, or any damages in respect of such arrears of rent or interest shall be recovered by any distress, action, suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, or by the person by whom the same was payable, or his agent."

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within the exception of the statute, and takes the case out of its general operation, as being a written acknowledgment of the person bound by the security. There is no case establishing this point exactly, but there are cases which afford a strong analogy. All contracts relative to a sale of land are required by the statute of frauds to be in writing; but if a parol contract be entered into for the disposition of an estate, which by the statute of frauds should be in writing, yet if the one party file his bill for a specific execution, and if the other party, in his answer, recognizes the contract, that is a sufficient compliance with the statute of frauds, *Seton v. Slade*(a); *Child v. Godolphin*(b); *Walker v. Walker*(c); *Lacon v. Mertins*(d). If a party, by his answer, admits the contract without relying on the statute of frauds, relief would be afforded, *Rowan v. Teed*(e). In that case, indeed, the defendant did rely on the statute, and consequently no relief was given; but this affords a strong analogy to the present case; the defendant here (the conuzor) admits the sum to be due on the security, and abandons the protection of the statute of limitations, of which he might have availed himself as effectually as the defendant in *Rowan v. Teed*.

Mr. Napier for the respondent.—

It would be very hard to decide that an acknowledgment, which a party is bound to make upon his oath, should bind him against a positive statute. The object of the statute was to protect lands, and it enacts that no more than a certain arrear of interest, in respect of any sum of money

(a) 1 Ves. J. 265.

(c) 2 Atk. 100.

(b) 1 Dickens. 39.

(d) 3 Atk. 7.

(e) 15 Ves. 375.

chargeable upon or payable out of lands, shall be recovered. Yet the statute goes on the presumption that the debt is due; and it is now held, that if a party rely upon the statute, he will be allowed the protection of it, independently of the debt being due. The old statute 8 Geo. I. was founded on the presumption of payment of the debt, but the present statute is quite independent of that question. The party was bound to answer upon oath. [PENNEFATHER, B.—He was not bound to say one word about it; he was not under any obligation to make such an affidavit.] A party may be allowed to contradict his own affidavit, as he is not estopped by it, *Thornes v. White*(a). But this acknowledgment is not within the terms of the statute; for it is not given to the person entitled to receive the debt. A very strong case occurred in the Queen's Bench, in an action upon a judgment, in which it appeared that, in an equity suit in which the conuzor had been defendant, it had been referred, by consent, to a Master in Chancery, to take an account of debts and incumbrances affecting certain freehold premises of the defendant, and to report thereon; and a report was made upon the reference, in which the Master found that the judgment was a charge upon the same freehold premises; the Court held that the Master was not the agent of the parties interested in the report, nor was his report an "acknowledgment in writing," within the 40th section of the statute of limitations; *Hill v. Stowell*(b). This is an affidavit made to the Court, not an acknowledgment to the party to whom the debt is due. Besides this, the petition was filed before any such acknowledgment of the debt was given, and the acknowledgment should be given before the institution of

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(a) 1 Tyr. & Gr. 110.

(b) 2 Jebb. & S. 389.

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the suit. [BRADY, C. B.—This affidavit was made before the conditional order was made absolute.] The statute was binding upon the officer in making his report, and he could not have allowed a greater amount of interest than for six years. I submit then that in the first place this affidavit was not conclusive; and in the second place it was not an acknowledgment given to the person to whom the sum was due.

BRADY, C. B.—I cannot distinguish this case from that of a bill filed to raise the amount of a judgment, and an answer sworn to it. Would the party swearing that answer be allowed to contradict it in the office? There is a strong case, the *East India Company v. Keighly*(a). In that case the Vice Chancellor, on the rehearing of the exceptions, was of opinion that the Master should not have permitted Mr. *Keighly* to enter into evidence for the purpose of establishing, not only that he had not made greater profits on the transactions in question in that case, than the sum admitted by his answer, but that he had, in truth, not made any profits at all, but had been a loser; he says, “it is said that although the *East India Company* might, “if they pleased, in the Master’s office, have immediately “charged Mr. *Keighly* with this admitted sum, and gone “no farther, yet because they required an account, they “opened the account altogether, and that Mr. *Keighly* “was therefore at liberty to contradict his own answer, and “to prove that he had made no profit, but had sustained a “loss. I am not of that opinion.” That case then decides that an answer is conclusive: We cannot travel out of it, and we must presume that there was a sufficient

(a) 4 Mad. 16.

acknowledgment in writing of the existence of the debt to the amount stated by the respondent.

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PENNEFATHER, B.—In this case the plaintiff says there is a sum of £553 19s. due; the respondent, in his affidavit, says that a sum of only £474 is due, and that it is to be paid out of a portion of his estate, and that that portion of the estate is sufficient to pay it. After such an admission there was nothing in controversy. That affidavit is conclusive on the Court, and ought to have been conclusive on the officer, as showing him that nothing was in controversy at the time, at least to the extent of the sum of £474.

FOSTER, B.—I concur with the opinions already expressed, and have come to the same conclusion as the rest of the Court, without conflicting with the opinion I have expressed in *Kelly v. Bodkin*. The defendant has not only acknowledged, in writing, the sum to be due, but has sworn that it is due. I think the case comes within the exception of the statute.

RICHARDS, B.—I do not think it necessary to put this case on the 42nd section of the statute of limitations at all. I look on it that the respondent, by his admission in this particular suit, has precluded himself from now alleging a lesser sum to be due. He admitted the sum of £474 to be due, and upon every principal of law and equity, as well as upon the authority cited by the Lord Chief Baron, we are to hold that this is the proper sum which the officer was bound to report unpaid.

Report amended, by consent, by inserting the sum admitted by the respondent to be due.

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LAW
EXCHEQUER.

ROBINSON v. CAMPBELL.

Tues. Ap. 27. **DAVID LYNCH** applied for liberty to enter judgment *or* a joint and several bond of two obligors with warrant of attorney for confessing judgment thereon, dated 1st. Nov. 1817, for the sum of £500 sterling, payable 1st. Nov. 1821. The obligee of the bond was dead and Mr. G. *Robinson* was his executor. One of the obligors was dead; and the principal sum was due. The bond was payable to the obligee, his executors, &c. but the warrant was restricted to entering judgment at the suit of the obligee.

COURT.—This does not authorize you to enter judgment at the suit of the executor:—you must proceed upon the bond.

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EXCHEQUER
OF PLEAS.

WISE v. M'MAHON.

Tues. Ap. 27. **ASSUMPSIT** for money paid; plea, general issue. The plaintiffs were Messrs. *Thomas and Francis Wise* of *Cork*, and the action was brought to recover a sum of £800 alleged to have been wrongfully obtained as the price of barley sold to them by the defendant. On the 29th Oct 1839, a person named *James Chambers* went to the office of *A*, agent for *B.*, residing in *Tralee*, sold 1200 barrels of barley to *W.* residing in *Cork*, to be delivered 'free on board the *D.*, then in *Tralee*, payment to be made on receipt of bill of lading and invoice.' On the 9th November the barley was delivered on board the *D.*, and a bill of lading made out to shipper's order, which was not forwarded. The vessel and barley were lost, on the voyage to *Cork*, on the 12th and before *W.* knew of the loss, *B.* produced the bill of lading to *W.* on the 16th November, and obtained £800 on account, without informing him of the loss of the barley.

Held, that the property vested in the vendee by the delivery on board; and that the £800 could not be recovered in an action for money had, &c.

the plaintiffs in *Cork*, and in an interview with *Thomas Wise* stated, that the defendant, who resided in *Tralee*, was shipping barley there for Glasgow; but that he (*Chambers*,) as the agent of the defendant, had the option of procuring a purchaser for it in *Cork*. The price demanded was 22s. per barrel; or (in case the insurance was not to be paid by the vendor,) 18s. per barrel. A sale note was made out as follows:—"I have sold to Messrs. *Wise*, for account of *Charles M'Mahon*, of *Tralee*, about 1200 barrels of barley, equal to sample, free on board the *Darling*, now in the port of *Tralee*, at 18s. 8d. per barrel of 16 stone, payment cash, on receipt of bill of lading and invoice. *James Chambers*, for *C. M'Mahon*, 29th Oct. 1839." *J. Wise* met *Chambers* on the 1st Nov. following, and got him to write on the sale note—"The freight agreed on is 15s. per ton."

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On the 9th Nov. 1839, the barley was all shipped by the defendant on board the *Darling*, at *Tralee*; and on the night of the 12th Nov. the *Darling*, with her cargo, was lost in *Tralee Bay*. On the 16th Nov., before Messrs. *Wise* had any knowledge of the loss of the vessel, *Chambers* went to *Cork*, and brought with him a bill of lading, dated 9th Nov. 1839, in the following terms:—"Shipped, in good order and well conditioned, by *Charles M'Mahon*, in and upon the good ship called the *Darling* of *Maryport*, whereof is master for this present voyage *John Atcheson*, and now in the Port of *Tralee*, and bound for *Cork*, a full cargo of screened and kiln-dried barley, 131 tons; being marked and numbered as in the margin; and to be delivered in the like good order and well-conditioned at the aforesaid Port of *Cork*, (the act of God, the king's enemies, fire, and all and every other

1841. "dangers and accidents of the seas, rivers, and navi-
 WISE "gation of whatever nature or kind soever, save risk of
 v. "boats, so far as ships are liable thereto, excepted,) unto
 M'MAHON. "shipper's order, he or they paying freight, after due
 "delivery of said goods, 15s. per ton. with primage and
 "average accustomed. In witness whereof, the master or
 "person of said ship hath affirmed to three bills of lading,
 "all of this tenor and date, one of which being accom-
 "plished, the other to stand void: Dated at Blennerville,
 "Nov. 9th 1839. Quantity unknown. *John Atcheson.*"

Chambers brought this bill of lading to *Wise's* office, on the 15th Nov., and produced it to Mr. *Thomas Wise*, who was the only one of the Messrs. *Wise* present; and having indorsed it, told *T. Wise* that he might insure the cargo; and demanded the amount, or some money on account. *Thomas Wise* refused to pay anything on account, without a written order from *M'Mahon*; *Chambers* then left the bill of lading with *T. Wise* in the office. *T. Wise* left *Cork* the following day, Sunday, 17th Nov. On the 18th (Monday) *Chambers* applied to Mr. *Francois Wise*, who gave him a cheque for £800, to recover back the amount of which, the present action was brought. The case was tried at the *Cork* assizes, before Mr. *Justice Perrin*, who directed the jury to find for the plaintiffs, the bill of lading having been made to the shipper's order, and not indorsed or forwarded to the plaintiffs. The jury accordingly found a verdict for the plaintiffs, saying, at the same time, that but for the direction of the learned judge they would have found the other way. A conditional order had been obtained on a former day to set aside the verdict, against which *Bennett*, Q. C. now appeared to show cause. The defendant's counsel claimed a right to begin.

[PENNEFATHER, B.—We had better hear the plaintiff.]
Collins, Q.C. for the defendant, observed, that the plaintiff
 being in possession of the verdict, the other side should
 more properly begin. [PENNEFATHER, B.—There is no
 course certain, but we always endeavour to take that
 which will be the most conducive to inform the court.
 We have found it more convenient that the plaintiffs'
 counsel should go on; Mr. *Bennett* is to show us that he is
 entitled to the verdict. RICHARDS, B.—The rule was
 formerly the same in this court as in the other courts; but
 a rule has since been made, that a person obtaining a
 conditional order should move to make it absolute. That
 rule, however, does not relate to motions for new trials.]

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Bennett, Q.C.—The bill of lading was made out to the
 shipper's order, and the cargo might all have been sold to
 another person before the indorsement and delivery to the
 plaintiffs; but the contract was not complete until the
 delivery of the bill of lading, and no property passed in
 the goods, as the indorsement was not made by *Chambers*
 until after the cargo was lost. *Morrison v. Gray* (a);
Ruck v. Hatfield (b); *Wackerbarth v. Masson* (c); *Dunlop*
v. Lambert (d); *Mitchell v. Ede* (e). The custom is, that
 one bill of lading is kept by the shipper, one is kept
 by the captain of the ship, and another is sent to the
 purchaser; and when the purchaser receives the bill of
 lading the contract is complete. If the bill of lading had
 been sent to *Wise*, before the cargo was lost, and he had
 accepted it, then indeed the contract would have been
 complete.

(a) 9 Moo. 484.

(b) 5 B. and A. 632.

(c) 3 Camp. 270.

(d) M'Clean and Rob. 663.

(e) 1 Per. and D. 513.

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Henn, Q.C. and *Collins*, Q.C. contra.—The property passed by the bill of sale and delivery on board the ship. Property, in goods sold, will rest in the vendee by delivery to a carrier, *Chitty on Contracts* p. 374, and the authorities there collected. In *Dixon v. Yeates*(a), *Parke*, J. lays down, that where there is a sale of goods generally, no property in them passes until delivery; because, until then, the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter agrees to take the chattel and pay the stipulated price, the parties are in the same situation as they would be after a delivery of goods in pursuance of a general contract. In *Fragano v. Long*(b), it was held, that the property of goods vested in the consignee, though the terms of sale were three months' credit from the time of arrival. It is not necessary, in order to vest the property of goods in a consignee, that the consignor should divest himself of all control over them. He may still have the right of stoppage *in transitu*, which does not depend upon a supposition that the property has not passed from the consignor, but, on the contrary, is founded on an admission that the property is transferred to some other person, *Abbott on Shipping*(c). The indorsement of the bill of lading is not absolutely necessary to vest the property of goods in a consignee, *Cross on Lien*(d); a bill of lading is not a necessary instrument in the transfer of the property in goods. *Meyer v. Sharpe*(e). In *Ogle v. Atkinson*(f), it was held, that the property in goods was changed by delivery on board the plaintiff's ship, and that

(a) 5 B. and Ad. 314.

(c) p. 459, 6th edition.

(e) 5 Taunt. 74.

(b) 4 B. and C. 219.

(d) p. 390.

(f) *Ibid.* 759.

the subsequent indorsement of the bill of lading was inoperative. This is a strong case in support of our position. [RICHARDS, B.—Is there any thing to identify these as the precise goods sold?] The bill of sale sufficiently identifies the goods as being “on board the *Darling* ;” the evidence ascertains that there were 90 tons of barley on board when the contract was made, and the rest was afterwards put on board. The delivery which the defendant undertook was performed, *Wackerbarth v. Masson*(a). *Bryans v. Nix*(b) establishes that there has been quite a sufficient indentification of the property. By the shipment on account, and at the risk of the consignee, the property vested in him, *Coxe v. Harden*(c). The only effect of the bill of lading being, in the form in which it was here made, was, as in *Coxe v. Harden*, to leave a right of stoppage *in transitu* in the consignor. If the matter had rested on the bill of sale and shipment alone, there would have been enough to have vested the property of the goods in the plaintiff; such was the opinion of a jury of merchants; and the bill of lading was in the common form used in the Port of *Cork*: the jury expressed their opinion that the bill of lading being to the shipper’s order, made no sort of difference. Unless there is something special in the bill of lading, every consignor is entitled to retain it for his own security, *Mitchell v. Ede*(d). There is a distinction between the right of possession and the right of property, *Wilmshurst v. Bowker*(e), and here the property passed by delivery on board the *Darling*, though the right of *possession* did not accrue until payment of the price.

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(a) 3 Camp. 270.

(b) 4 Mee and W. 775.

(c) 4 East, 211.

(d) 3 Per. and D. 513.

(e) 7 Scott 581

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In *Boulter v. Arnott*(a), it was held by Lord *Lyndhurst* that where goods were sold and packed in the defendant's boxes, on the plaintiff's premises, the property had passed, so that an action for goods sold and delivered would be maintainable; so in *Phillimore v. Barry*(b), the property in goods sold, vested absolutely in the purchasers before delivery, *Kymerv. Supercroft*(c). In *Noy*, p. 88. it is said, that if a horse be sold, and die before he is delivered to the purchaser, the purchaser shall bear the loss. Delivery to a carrier is sufficient delivery to vest the property in goods in the consignee, *Oppenheim v. Russel*(d); *Daves v. Peck*(e); *Dunlop v. Lambert*(f). [BRADY, C.B.—The question we are called on to decide is, whether a party precludes himself from suing for the price of goods, when he takes a bill of lading of them in his own name; whether taking it in this form shows that he has not parted with the property in the goods.] In *Clarke v. Spence*(g), it is laid down, that the general property in goods under contracts of sale, vests by the contract; and the payment of the price is quite immaterial for that purpose. Mr. *Chambers* was not bound to say anything about the loss. There is no case or dictum showing that the bill of lading should be sent off immediately after the shipment of the goods; it should properly arrive at the time when the goods arrive; as it is merely the receipt of the captain for the goods, and is only useful as a warrant for the consignee to demand the goods from the carrier. The only case against us is *Barber v. Taylor*(h), upon this point; but the judgment in that case has reference to the pleadings, upon

(a) 3 Tyr. 267.

(c) 1 Camp. 109.

(e) 8 T. R. 330.

(g) 4 Ad. and Ell. 448.

(b) 1 Camb. 513.

(d) 3 B. and P. 42.

(f) Maclean and Rob. 675.

(h) 5 Mee and W. 527.

which the issue was raised whether the bill of lading was delivered within a "reasonable time."

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T. B. C. Smith, Q.C. in reply.—It was the essential duty of the consignor, when the goods were put on board, to have put the bill of lading immediately. *Brant v. Bowlby*(a), was a case in which the facts were somewhat similar to those in the present; it was there held that the property did not vest absolutely by the shipment without performance of the other terms of the contract. In *Craven v. Ryder*(b), the shipper, by having taken a receipt for the goods in his own name, was held entitled to bring trover for them. If a bill of lading be made to the order of the shipper, or his assigns, and indorsed in blank and transmitted by the shipper to a third person, it vests the property of the goods in the person to whom it is transmitted. It may be deduced from what is laid down by Justice *Buller*, in *Lickbarrow v. Mason*(c), that the bill of lading should be sent off as soon as possible. That the purchaser should be his own insurer, is a fact which cannot alter this principle. The delivery of the bill of lading is such a symbolical delivery of the goods, as to divest the right of *stoppage in transitu*, when made to a third party; for he who has received the bill of lading has as much right to insure or sell the commodities, as if he had them in his possession. It is not sufficient, where there is a contract for the sale of goods, that they should be merely put on board a general ship: there must be a bill of lading, indorsed either in blank, or specially. In *Fragano v. Long*, the goods were marked with the initials of the purchaser. In *Noble v.*

(a) 2 B. & Ad. 932.

(b) 2 Marsh. 127; 6 Taunt. 433.

(c) 6 East 21 note

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Atkinson (a), they were delivered on board the purchaser's own ship, which was equivalent to a delivery to himself. The transfer of goods at sea is subject to different rules from the conveyance of them by a common carrier by land.

RICHARDS, B.—This case comes before the Court on a motion for a new trial. It appears that on the 29th October, 1839, a person named *James Chambers*, assuming to act as the agent of the defendant, entered into a contract with Messrs. *Wise* of *Cork*, in the following words, (here his Lordship read the sale note). That barley, it appears, was afterwards put on board a vessel called the *Darling*, and a bill of lading was executed by the captain, on the 9th Nov. 1839, which bill of lading was of a peculiar form. Subsequently to the sale, it appears that the goods were lost; of which Messrs. *Wise*, do not appear to have been aware till afterwards; no communication was made to them by *M' Mahon*, intimating that he had put the barley on board the vessel, or that he had any knowledge of the contract entered into by his agent; nor does it appear that he had ratified, or approved of it in any way. Under these circumstances it appears that after the goods were lost, *M' Mahon* concealing the loss from *Wise*, and *Wise* conceiving the goods to be safe, *Chambers*, on the 18th November, procured £800 from Messrs. *Wise*, and this action is now brought by Messrs. *Wise*, to recover back that sum. These are the facts of the case. A great many authorities have been referred to in the argument of this case by counsel at both sides, many of which, (not controverting the principles therein laid down) I think it unnecessary to notice; others I shall refer to presently.

(a) 12 Mod. 156.

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As a general proposition it may be admitted that upon a contract for the sale of goods, to be sent by the vendor to the vendee, the delivery of such goods to a carrier, in order that they may be delivered to the vendee, is in law a delivery to the vendee. On the other hand it may be also admitted as a general proposition, (subject no doubt to exceptions) that a vendor making a bill of lading, which in express terms makes the goods deliverable to himself, or to order or assigns, is thereby enabled to pass the property in the goods to a *bonâ fide* purchaser for valuable consideration without notice of any prior sale. Three questions arise, in my opinion, upon this case. 1st. Whether the delivery of the goods agreed to be purchased by the plaintiffs, from the defendant, on board the ship called the *Ring*, was an absolute delivery to the plaintiffs, the *Wise*, so as to pass the property in the goods, and pass, in contemplation of law, the possession of the goods to them; and thus make the plaintiffs liable for the risk of voyage, notwithstanding the form of the bill of lading. 2dly. Whether the delay in transmitting the bill of lading, or the circumstances in this case, coupled with the form of that bill of lading, are not sufficient to exonerate the plaintiffs from the risk of the voyage; and sufficient on the goods being lost before the delivery of the bill of lading to the plaintiffs, to justify them in repudiating the contract. 3rdly. Whether, the goods in this case having been sold by sample, it was not necessary that there should be some distinct act of appropriation upon putting them on board, or subsequently, in order to pass the property in them to the plaintiffs; and whether there was, under the circumstances of this case, any distinct act of appropriation sufficient to bind the plaintiffs and to make them responsible for the risk of the voyage.

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I shall first consider the case without adverting to the distinction between the sale of a specified and distinct chattel and of goods sold per sample. Now, the counsel for the defendant have insisted that the delivery in this case was delivery, in effect, into the store of the plaintiffs; insisting that the vessel, the *Darling*, should upon the evidence, as regards being had to the terms of the bill of sale, be considered as the plaintiff's vessel and store; and the captain, whom the goods were delivered, as the servant, or special agent of the plaintiffs. If I could take that view of the case, I would at once admit the force of the arguments, strongly pressed by the defendant's counsel: but let us see how that is.

That the vessel was not originally, in any sense, the property of the plaintiffs is very plain, upon the undisputed facts in the case. She not only was not originally hired or chartered by the plaintiffs; but it appears by the evidence that a part of the cargo had been actually shipped on board of her by the defendant, before the person assuming to act as his agent had entered into any negotiation whatsoever with the Messrs. *Wise*, on the subject; and it further appeared, that the original destination of the vessel was *Glasgow*; but, on the contract being entered into with Messrs. *Wise*, it was agreed that the defendant, who had the power of so doing, should alter the destination of the vessel and send her to the port of *Cork*, instead of to *Glasgow*; it is thus very clear, in my opinion, that the original contract for the carriage of the goods, (if the vessel was not, as a point of fact, the property of the defendant) was made between the defendant and the master or owners of the vessel, whoever they were; and was so made without any kind of participation therein by the plaintiffs, who at the

time were total strangers to the transaction ; and indeed in no part of the transaction do the Messrs. *Wise*, appear to have had any kind of communication with the master of the vessel ; nor is there a particle of evidence to show that, even after the contract, the master of the vessel knew any thing of the dealings between the plaintiffs and the defendant, much less that he could have understood that he was to receive the barley for account of the plaintiffs, and as their property ; or that he was in any privity with them. I cannot therefore yield to the argument, that the vessel was in that case to be considered as the private store of the plaintiffs ; and upon this point I would refer to the case of *Mitchell v. Ede*, which I shall have occasion to state more fully presently.

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But let us next see whether the defendant himself, upon putting the barley on board, affected to deliver it as into the store of the plaintiffs ; and I think it will be found very clearly that he did not. The bill of sale is in this form, (Here his Lordship read it) and the bill of lading, acting upon that bill of sale is in this form, (here his Lordship read it). Now I take it that the defendant framed the bill of lading in the form that I have read for the express purpose of preventing the barley getting into the defendant's hands before payment ; and I know of no better mode of effecting that object, than by making the captain sign a bill of lading, binding him to deliver the goods "to his (the shipper's) order or his assigns"; and I confess I cannot find any thing in the character of the vessel, or in the relation of the plaintiffs thereto, or to the master thereof, that should have prevented the defendant from reserving the power of so directing the disposition and delivery of the goods. The particular terms of the bill of sale making the payment for

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the cargo by the plaintiff dependant upon the delivery of the bill of lading to them, instead of making in favor of the argument relied on by the defendant, makes in my opinion the other way. I think it shows that it was never intended that the defendant should part with the power of disposition over the goods, or with the symbol of possession till paid the sum for which he agreed to sell them. At the events I think it plainly opened to the defendant a power of taking such a bill of lading from the captain, as would prevent the goods from passing at once to the plaintiffs by their shipment. The case of *Mitchell v. Ede* bears, I think, very strongly upon this point—First, in that case the foreign merchant had put the goods on board the vessel of the defendant for the defendant's account. Secondly, he wrote to the defendant that he had done so, and directed him to insure for the same; which the defendant did, in his own name. Thirdly, he drew at the same time on the defendant for £1200, on account of the shipment, which draft the defendant accepted and paid. Fourthly, the bill of lading, when signed by the captain, was to the effect that he should deliver the goods to the defendant, or his assigns. Yet the Court, held that the goods did not pass to the defendant, upon their being put on board his vessel; and that the shipper had nevertheless a controul over the goods, and he having put a special indorsement, or memorandum on the bill of lading, the Court held that he had a right so to do, and to pass the property to another person; holding 1st, that the vessel, though the property of the defendant, was not to be considered, even under the circumstances of that case, (which were in that respect much stronger than any which exist in the present) as the store of the defendant so as to make a delivery of the goods on board an absolute delivery to the defendant. 2ndly, that notwithstanding

letter of advice, the insurance, the draft for £1200, and the payment of that draft by the defendant, the shipper still had a controul over the goods and a power of directing their disposition. In the judgment of Lord *Denman*, in that case most of the authorities relied on have been so fully discussed and distinguished, that I feel it would be superfluous to go through them in detail, at any great length. *Brant v. Bowlby*, is another case, however, to which I would refer. That case shows that the delivery of the goods into the vessel of one of the contracting parties, will not necessarily pass the goods to him, and that such delivery may be qualified and controuled by the bill of lading; and that the right of possession does not necessarily pass by the putting the goods on board. The case of *Wilmshurst v. Bowker*(a), to which we have been referred by my Lord Chief Baron, appears also to bear upon this point.

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Against the principle to be extracted from these cases, the counsel for the defendant have relied on *Ogle v. Atkinson*. Now in that case the goods were originally purchased by the shippers for the plaintiff in the action, and were so purchased by the express orders of the plaintiff, and were put on board the plaintiff's own vessel, and expressly put on board as the goods of the plaintiff; the shipper stating to the captain, that they were the plaintiff's goods.

Besides which, the shipper wrote a letter of advice to the plaintiff, apprizing him of the shipment, and inclosing the invoices and bills of lading; the invoices expressing that the

(a) 7 Scott, 561.

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flax was shipped for account, and at the risk, of the plaintiff. The shippers, also, afterwards write to the plaintiff another letter showing that they treated the goods as the plaintiff's, and so shipped them. The case then goes on to state, that after the captain had received the goods, as he was requested by *Scmidth and Co.* (the shippers) to sign a bill of lading for them, deliverable to—or order, for which he was to receive freight at the rate therein specified, the captain objected to sign the bill of lading with a blank for the name of the consignee, until *Scmidth and Co.* assured him that was of no consequence, as the goods were to be delivered to his owner; upon which he signed it. Chief Justice *Gibbs*, in giving his judgment in that case says, “no doubt a delivery on board the ship was an absolute delivery to *Ogle*, unless qualified;” does the case therefore state any such qualification? The case states that the captain received the goods as the plaintiff's own goods;—which means his own goods absolutely. In truth, in *Ogle v. Atkinson*, the attempt to get from the captain of the plaintiff's vessel, a bill of lading in blank, after the goods had been actually put on board the plaintiff's vessel, as the plaintiff's goods, and after the property had so vested in the plaintiff, was a most extraordinary attempt on the part of the shipper; and the obtaining of such bill of lading under the circumstances of that case was held, I think rightly, not to divest the property in the goods before vested in the plaintiff, by an unequivocal delivery of them as his goods, into his, the plaintiff's, own vessel, and to his own captain; and it is in that way Lord *Denman* understands the decision in *Ogle v. Atkinson*; see his comments on it in *Mitchell v. Ede*. But surely nothing can be more unlike the facts in *Ogle v. Atkinson*, than this case. *Fragano v. Long* has been also relied on. In respect to that case, it may be sufficient to

say that the goods were initialed for the buyer, and directed to him before they were put on board the canal-boat ; they were also insured by his order, and the interest declared to be in him, and all this was done by the shipper himself.

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I shall have occasion, in considering the third question that I have mentioned, to allude to other cases ; and therefore I forbear to do so now, though they also bear upon the point which I am at present upon. These cases, and others to which I shall presently advert, very clearly show, in my opinion, that it was in the power of the defendant to qualify and controul the effect of the delivery of the goods into the *Darling* ; and I think he did so,—and having so done, and having taken the bill of lading, making the goods deliverable to himself and his assigns, I am of opinion upon the second question that I have proposed, that he ought, and in order to make the Messrs. *Wise* responsible for the risk of the voyage, was bound, in a due and reasonable time to have apprised the Messrs. *Wise* of the shipment ; and should either have transmitted to the plaintiff, or to his (the defendant's) own agents in *Cork*—the bill of lading properly indorsed to the Messrs. *Wise*, in order that the same should be forthwith delivered to them, on their paying for the goods ; or, at all events, should have notified to them that the goods in question had been shipped for their account. And this, I think, was the more necessary, when we consider that *M'Mahon* had never himself, in any distinct or binding manner, up to the time when the cargo was lost, ratified the contract entered into by his agent. *Clarke v. Hutchins*(a) ; *Barber v. Taylor* (b). But the defendant, instead of doing

(a) 14 East. 475.

(b) 5 Mee. & W. 525.

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this, which was the plain and obvious course for him to pursue, not only does not transmit the bill of lading to the Messrs. *Wise*, but he does not even intimate to them that the corn had been put on board or shipped for them; nor in any way affirm the contract of his agent, until the vessel had been wrecked and the property lost; then, and not till then, on the 16th November, the bill of lading is produced to Mr. *Thomas Wise*; and upon his expressing dissatisfaction at so very unmercantile a mode of acting, (as no doubt he well might,) the defendant's agent leads him to believe, most untruly, that the cargo was then all safe. Any act of the Messrs. *Wise*, or either of them, after this false representation by *M' Mahon's* agent, respecting the state of the cargo, I put out of the case.

A great deal of discussion has taken place in respect to the legal effect of a *contract* for a sale of personal chattels. And it is insisted that such a contract as the present, passed not only the property in the goods but the possession of them to the Messrs. *Wise* the moment they were removed from the vendor's store; or, at all events, as soon as they were put on board the vessel that was destined to convey them to *Cork*. No doubt, had the Messrs. *Wise* been willing to pass over the neglect of *M' Mahon* to notify that the goods had been so shipped, and to dispense with the transmission to them of any bill of lading in due and regular course, the goods contracted for, (subject, however, to what I shall presently observe when considering the third question raised in the case,) as between *Wise* and *M' Mahon*, and any one claiming under him, even as a purchaser, with notice of the contract, might be deemed to have passed to the plaintiffs. So would the possession of the goods in *Clarke v. Hutchins*; and in *Barber v. Taylor*

have passed to the buyers in both cases ; had they been willing to overlook the plaintiff's default and neglect. But does it follow that the Messrs. *Wise*, either from having lost their market by the delay in transmitting the bill of lading ; or the power of insuring ; or for any other cause, refused to overlook these acts which, in reason and justice they were entitled to expect and require, and, therefore, refused to accept the barley or to ratify their contract ; does it follow, I ask, that *M' Mahon* could, in *invitum* hold the Messrs. *Wise* to the contract, and make them liable to the risk of the voyage ? The propositions are, in my opinion, very different. The defendant could not by any omission or default upon his part, as long as the Messrs. *Wise* were willing to excuse such default and to fulfil their contract, absolve himself from the engagement he had entered into ; though by means of such default he might release the Messrs. *Wise*, or enable them to release themselves altogether from the contract. But it has been argued that the intention of the defendant, in shipping the goods on board the *Darling*, must be collected, not from the bill of lading, coupled with his detention of that document, and with his omission to notify to Messrs. *Wise* that he had shipped the barley for their account, but from something else, for instance, from the bill of sale. And it has been said that the defendant was bound, according to the terms of that document, to have shipped the goods for account of the plaintiffs, and at their risk ; and that, therefore, in point of law, he could not have done otherwise. And it has been further said, that possibly on a new trial, the intention of the defendant, in respect to the shipment which he so made, may be more fully explained and developed. Now I have already stated that, in my opinion, the

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defendant was not bound to ship the goods, so as to part with all controul and power of disposition over them, or to pass the possession of them absolutely to the plaintiffs; but if he were, I do not think it lies in him to say, that because he ought to have so acted, it shall be taken in opposition to the written evidence coming out of his own hands to the contrary, (I mean the bill of lading,) that he did so act. I deny that we have any right to go into an investigation (for the purpose of affecting the plaintiffs,) in respect to what might have been passing in the mind of the defendant, when he put his barley on board the *Darling*. What signifies it to the Messrs. *Wise*, what the defendant meant to do, so long as he did that which must necessarily have prevented their insuring, selling, or otherwise dealing with the goods as they were entitled, and would have been enabled to do, had the bill of lading been forwarded to them? The effect of the bill of sale, and of the bill of lading, coupled with the detention of it for the period I have mentioned by the defendant, must, in my opinion, be considered more as matter of law than as matter for a jury, upon the written evidence and conceded facts in this case. I do not mean to say that the question, "what was reasonable time for the transmission of the bill of lading to the plaintiff," may not be a jury question; but it was matter of law, that the bill of lading should be transmitted in a reasonable time, to the plaintiffs; and if that be conceded, or if I be well founded in that position, I think it impossible to argue for a moment that the bill of lading upon the facts in this case, was transmitted to the plaintiff in a reasonable time. In principle, therefore, the mere transmission of the bill of lading, coupled with the written evidence in this case, was as much matter of law as the

question upon which the plaintiff was nonsuited, in *Clarke v. Hutchins*, or that upon which the Court decided, in *Barber v. Taylor*. It appears to me, therefore, to be sacrificing substance to form, to set aside this verdict, because the question of reasonable time, as to the transmission of the bill of lading, was not submitted to the jury. The learned judge told the jury, according to the certificate of the plaintiff's counsel, that, "in point of law, the bill of lading, coupled with the fact of the delay which had occurred in its transmission to the plaintiffs, rendered the defendant liable to the loss which had arisen of the cargo; and stated that, in his judgment, the parol evidence did not affect the case." And in the opinion, so stated to have been expressed, by the learned judge, I fully concur. But, hitherto, I have discussed and considered the case as if the contract had been for the sale, on one hand, and purchase on the other, of some specific chattel; some particular thing that had been identified at the time of the contract, but that is, in truth, not the case here; the contract was not for the sale of any particular chattel; it was for a quantity of barley, that should resemble a certain other smaller quantity then produced by way of sample, and the contract would have been fulfilled by the defendant's shipping *any* barley, no matter where procured, that would have been equal to the sample. There was no engagement on the defendant's part to deliver any specific grain or grains of barley; and, therefore, without something more than the mere sale note, it is manifest that no property, in any particular thing or chattel, could have passed to the plaintiffs, or that the plaintiffs could, in any way, have been made liable for the loss. To make the plaintiffs liable for the risk and loss that had taken place, it must be first shown that the property in this particular

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barley passed to them ; for if this particular grain was not theirs, they cannot be affected by its loss or destruction. The contract, on the part of the defendant, to ship a certain quantity of barley for account of the plaintiffs was executory ; so was the contract on the part of the plaintiffs to pay.

Now, that being the nature of the contract, I think it the more important and necessary, that some subsequent, distinct, and unequivocal act of appropriation should have been done by the defendant, in order to pass the property in the particular grain in question to the plaintiffs ; and until such unequivocal appropriation was made, the property in the grain, much less the possession of it, never did, in law, vest in the plaintiffs ; nor could they have brought trover for it ; their right of action against the defendant for breach of contract, if he failed to fulfil his contract, is quite another thing. But suppose the defendant, after he had put the barley on board, had taken it out of the vessel again and sold it to another ; and again shipped other barley for the plaintiffs, equal to the sample, would he not have fulfilled his contract ? I think he would ; at all events, I do not think the plaintiffs could have maintained an action of trover for the first cargo. There are a great many cases upon this subject, and I think it will be sufficient authority to refer to them, observing merely that were the property in goods, whether grain, sugar, or any other commodity contracted to be bought *per sample*, was held to pass to the purchaser some specific and unequivocal act of appropriation of the articles, in pursuance of the terms of the contract, was clearly shown.—*Rhode v. Thwaites*, 6 B. & C. 388, *Alexander v. Gardner*, 1 Bing. N. C. 671, *Sparke v. Marshall*, 3 Scott. 172, *Bryans v. Nix*, 4 Mee &

Wel. 775. Now, was there any such unequivocal act of appropriation in this case? In my opinion there clearly was not. On the contrary, I am of opinion, and especially having regard to the bill of sale, that the defendant in taking the bill of lading in the form in which he did, intended that the property in the barley should not pass to the plaintiffs by the mere delivery of it on board the *Darling*; and by withholding the bill of lading till after the goods were lost, prevented the property therein from ever passing to the plaintiffs. I ask, can that be held to be an unequivocal act of appropriation which reserved to the shipper a power of holding himself out to the world as the owner of the property, and enabled him, if so minded, to sell it and pass the property in it to whomsoever he pleased for value, by a mere indorsement of the bill of lading, and if that act be equivocal, can his withholding the bill of lading for five days after its execution be held to render it less so?

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Upon this ground also, independently of the two other grounds that I have first alluded to, I think the plaintiffs were entitled to recover in this action. But then it has been said that the defendant may be able hereafter, at a future trial, to produce other evidence. I do not know how that may be, but I think it sufficient to say, that there is no application to the Court to set aside the verdict on that ground; nor is there a suggestion at the bar of any evidence that according to my view of the case, could controul the effect of the documentary evidence, coupled with the undisputed facts of the case. For these reasons I think the verdict ought not to be disturbed.

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PENNEFATHER, B.—I think we all must feel obliged to Baron *Richards* for the pains he has taken with this case, and the manner in which he has expressed his opinion about it; but though he has argued very ably upon it, I am not convinced by the view he has taken. It appears to me that the argument of my Brother *Richards* proceeds on the assumption, that the matters given in evidence were such as to take away all consideration from the jury as to their effect. Many principles have been laid down by him which I do not controvert; but the objection I feel is to the ruling of the judge. In the opinion of Baron *Richards*, that there was no question on which the jury should pronounce their opinion, nor any thing to be submitted to them. The circumstances of this transaction arose on the communication made by *John Chambers*, the agent of Mr. *M'Mahon* to *Wise*, on the 29th October. That *Chambers* was the authorized agent of *M'Mahon*, does not appear to be disputed; and therefore the case appears to me to be the same as if this contract had been made by *M'Mahon* himself. At all events, if *Chambers's* authority were disputed, that was not the question on which the jury were called on to exercise their judgment; and in the absence of any such question, I am bound to assume that *Chambers* was the authorized agent of *M'Mahon*, and that, in that sense, the contract should be considered as the contract of *M'Mahon* himself. I think it may be admitted that the contract was not for any specific distinct barley; the barley not having been weighed out and measured, something more was necessary to enable *Wise* to maintain trover for it; and that other matter necessary to complete the contract was, delivery on board the *Darling*; not merely delivery, but delivery *in pursuance of this contract*; and as soon as that was completed, it appears to me, on all the

circumstances of the case, and on the authorities, that a right to maintain trover for the goods accrued to *Wise*, and a right of suing for their price accrued to *M'Mahon*; the latter subject to the terms of producing and handing over the bill of lading to *Wise*; for I agree with my Brother *Richards*, that whether *Wise* could maintain trover for the goods or not, *M'Mahon* could not previously maintain an action for their price; but the right of either party, I think, accrued on the delivery of the goods on board the *Darling*, in pursuance of the contract. Then the question here is, whether there is any evidence that the goods were delivered on board the *Darling*, in pursuance of the contract; or are there facts in the case which exclude the consideration of that matter? The price agreed on was 18s. a barrel. If *M'Mahon* were to have insured the barley, the price would have been 21s.; but the lesser price, as it appears from the evidence, was agreed to, because it was understood that *M'Mahon* was not to insure it, and that *Wise* would either insure or take the risk of not insuring. It appears, from the dealings of the parties, that the latter proposition was that acceded to by *Wise*. Then, no doubt, the goods were put on board this vessel, the original destination of which had been *Glasgow*, but which was altered for *Cork*, the residence of *Wise*. Is that matter to be withdrawn from consideration, when we endeavour to ascertain whether the goods were put on board, in pursuance of the contract? I agree that what passed in the mind of *M'Mahon* is not matter on which the Court or the jury can be called to act, for we cannot know, except from his acts, what it was that passed in his mind. But if his acts all appear to show an affirmance of that contract, can these acts be said not to show that it was his intention to con-

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firm it? The goods are put on board, and supposing it demonstrated that they were put on board in pursuance of that contract, is such a case to be met by his having taken a bill of lading in his own name, and his having neglected to forward it to *Wise* forthwith? I am not aware of any case which requires a vendor to notify to the vendee that he has done an act in pursuance of a contract, or that a vendor must give notice the following day when goods have been put on board. I admit that delay for an unreasonable time may be evidence that the goods were not put on board in pursuance of the contract; but I refer to the case mentioned by Baron *Richards* for another purpose, *Clarke v. Hutchins*, as demonstrating that it was unnecessary for the vendor to give notice that he had put the goods on board. In that case the goods were sent by a general carrier, and their value exceeded £5. The seller did not pay extra price for the carriage, or notify that the value was over £5. It was therefore contended that there had not been a complete delivery to the carrier of the vendee; for if he had put the goods into the carrier's possession, in such a way as that the carrier was bound to deliver them safely, I think there would have been a sufficient delivery to have vested the property in the defendant. I do not rely on that case alone; but I think there is nothing in it which shows that it is necessary for a vendor to intimate by the next post to the vendee that his goods have been sent; the right of stoppage *in transitu* is a right which every consignor is entitled to have; and that right, which is only to be exercised in case of the insolvency of the vendee, would be put an end to if the vendor were obliged to transmit immediately the bill of lading to the vendee. It is matter of evidence whether the bill

of lading is held back for a legitimate purpose or not : the time also is matter for the jury to consider ; they are to say, whether it is a reasonable time or not. I take that to be the current of all the authorities, and it is recognized by the Court of Exchequer in *Barber v. Taylor*(a). It is here assumed by the Court, that the question of time must have been submitted to the jury. The authority of *Chambers* being undisputed, and the case being considered as if the contract were made by *M'Mahon* himself, it has been found by the jury that the bill of lading was taken in the usual way ; for the judge has reported that the jury would have found the other way but for his direction ; the jury, therefore, must have thought that there was nothing of a conclusive character in the form of the bill of lading. Neither did the judge think that the taking of the bill of lading, in the form in which it was made, was sufficient to controul the question ; but he took upon himself to judge of the unreasonableness of the delay in sending it.

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But is there any case which says, that a bill of lading must be sent by the next post ? There is no case which puts a bill of lading on the same footing as a bill of exchange ; in respect of bills, there is an usage, which, by its universality, is matter of law ; but where a bill of exchange is drawn, payable so many days after date, the holder is only bound to present it within a reasonable time.

What is a reasonable time is matter for the jury. Then if there is no case that determines that a bill of lading should be sent by the next post, how is the line to be drawn ? Is there any case deciding that it must be sent by the second, third, or fourth post subsequent ?—I am not aware of any such authority. It was a matter for the jury ; and here

(a) 5 M. & W. 525.

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they should have had to consider from the circumstances of the case, and especially that of it being expressly declared that *Wise* did not intend to insure, whether the vendor was not sufficiently discharged from sending forward the bill of lading by the next post. On these grounds it occurs to me that the judge was wrong in saying that the bill of lading, though in the form in which it was taken, and though it was delayed for five days, concluded this question. These were circumstances, no doubt, to be seriously considered; and if the jury had come to the conclusion that the goods were not put on board in pursuance of the contract, and that *M'Mahon* intended to reserve to himself a power to dispose ultimately of them, I should not dissent from the verdict. But I cannot feel justified in withdrawing from the jury the other circumstances of the case. To vest the property of the goods in *Wise*, it was necessary they should have been put on board, and put on board in pursuance of the contract. If they were so, I think the property passed to *Wise*, and if so, *M'Mahon* was entitled to the price. But the contract being complete, that was only necessary for him in order to complete his title to the price; it does not appear that the reference to the bill of lading was otherwise made as any essential part of the contract. There may be inconvenience, under such circumstances, in some ordinary cases; but if *Wise* neither wanted to insure or to dispose of the goods, there was no great inconvenience in his not getting the bill of lading. The conclusion I come to is, that the learned judge was mistaken; and, on the whole, I think the case was not properly discussed before the jury, and that there should be a new trial. Baron *Foster*, who has been prevented by a private calamity from giving a

his assistance on this occasion, has come to the same conclusion as the Chief Baron and myself.

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BRADY, C. B.—In this case I concur in the opinion entertained by Barons *Pennefather* and *Foster* : but although the case has occupied a considerable time, I feel that it is due to Baron *Richards*, and to the parties in the case, that I should state my reasons for agreeing with them. The question was, whether on the 12th November, when the goods were lost, they were at the risk of the plaintiffs or of the defendant. No question has been raised here as to the rights of third parties ; no question has been raised as to the statute of frauds ; but the case is simply one between vendor and vendee. The law of *England* has long established that the completion of a contract transfers the property in the subject of it to the buyer, although there has been no actual delivery of the subject matter of it into the purchaser's own hands. This is recognized in *Hinde v. Whitehouse*(a). To make a contract complete within this rule, the goods must be ascertained and the price fixed, *Clarke v. Spence*(b). In this case there is no question but that a valid contract was made by the sale note and delivery. No controversy was raised at the trial as to *Chambers* being the agent of *M'Mahon*, and the contract must be considered as if made by *M'Mahon* himself. The contract points out how the sale was to be effected ; namely, by delivery on board the *Darling* ; and it is admitted that there is no question as to the quantity and quality of the barley. Under these circumstances, it is clear that, when the defendant shipped the goods, he then

(a) 7 East. 558.

(b) 4 Ad. & El. 469.

before their arrival at their place of
the bankruptcy or insolvency of the
of lading here was in the usual form ;
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of sale, a condition precedent to payment
case establishing that the bill of lading
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McCall v. Taylor was a case which proceeded
ounds, and the judgment of Baron *Parke*
these special grounds. The case alluded
Marshall(a), is one in which the plain-
a cargo without any bill of lading, and
party had sold the goods before any bill
was signed ; so that, so far as regards the
of insuring, the possession of a bill of lading
sufficient. I apprehend that insurances are
every day without the insurers seeing the bill
, and I know of nothing rendering it essen-
the contemplation of these parties, that a bill of
should be immediately sent. However it is said,
on delivery of the goods on board, the vendor was
to transmit information to Messrs. *Wise*, in order that
might assent to the delivery ; but, if shipped in pursu-
of the contract, could the plaintiffs have refused to
them ? No doubt something more than the mere
pment would be necessary, as was held in *Mitchell v.*
Is. In *Alexander v. Gardner(b)*, no vessel was named
the dealing between the parties, as that on board of
rich the goods were to be shipped, and from thence it

1841.
WISE
v.
M'MAHON.

(a) 3 Scott, 172. (b) 1 Bing, N. C. 671 ; 1 Scott, 281, 630, S. C.

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 WISE
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ascertained the barley which was to be the subject of the sale, and the liability of the vendee then accrued, *Dutton v. Solomonson*(a); B. N. P. 30, where a case of *Twining v. Freeman* is cited, in the note to p. 36, to this effect: that where a defendant ordered goods of the plaintiff, to be sent by the first ship to *Falmouth*, and they were delivered at a wharf and entered accordingly, though they were not in fact sent by the first ship, yet that was a sufficient delivery to the vendee. *Fragano v. Long* is an equally strong case on this point. Another authority, bearing more directly on the subject, is what is said by Justice *Parke* in *Swain v. Shepherd*(b). In *Bryans v. Nix*, the same judge (then a Baron of the Exchequer) says in p. 793, that if the goods, the subject of that case, *had been put on board for the purpose of fulfilling the contract, and had been received by the master as such*, before any new title to these goods had been acquired by a third person, the Court would have held that the property in these goods passed to the plaintiffs. The case of *Tarling v. Baxter*(c), goes to the same point.

The first question then is, whether the goods were put on board the *Darling* in pursuance of the contract; I will assume the fact to be so; and that when the barley was put into the ship, it was shipped by *M'Mahon* pursuant to his contract, so that if the ship had taken fire, the loss would have fallen on *Wise*. No authority has been produced to show that it is the duty of the vendor of goods, not paid for, to have a bill of lading made out and delivered to the vendee. The vendor is entitled, in my opinion, to retain his authority over the goods, and may countermand

(a) 3 B. & P. 582. (b) 1 Moo. & Rob. 224. (c) 6 B. & C. 360.

the delivery of them, before their arrival at their place of destination, in case of the bankruptcy or insolvency of the consignee. The bill of lading here was in the usual form ; but the plaintiff contends that by delaying to forward the bill of lading, the defendant has failed to complete his part of the contract. The delivery of the bill of lading is made, by the bill of sale, a condition precedent to payment . but is there any case establishing that the bill of lading must be forwarded by the first or second post after it is signed ? *Barnewall v. Taylor* was a case which proceeded on special grounds, and the judgment of Baron *Parke* places it on these special grounds. The case alluded to, *Sparke v. Marshall(a)*, is one in which the plaintiff insured a cargo without any bill of lading, and where the party had sold the goods before any bill of lading was signed ; so that, so far as regards the purposes of insuring, the possession of a bill of lading cannot be sufficient. I apprehend that insurances are executed every day without the insurers seeing the bill of lading, and I know of nothing rendering it essential, in the contemplation of these parties, that a bill of lading should be immediately sent. However it is said, that on delivery of the goods on board, the vendor was bound to transmit information to Messrs. *Wise*, in order that they might assent to the delivery ; but, if shipped in pursuance of the contract, could the plaintiffs have refused to take them ? No doubt something more than the mere shipment would be necessary, as was held in *Mitchell v. Ede*. In *Alexander v. Gardner(b)*, no vessel was named in the dealing between the parties, as that on board of which the goods were to be shipped, and from thence it

1841.

Wise

v.

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 WISE
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appears that a party may say, I had a right to know in what vessel the goods should be sent. There is a case decided in the House of Lords, *Dunlop v. Lambert*(a), in which the question was, who was the party to sue; and there it appeared that the invoice and bill of lading were not sent till some days after they had been signed; but the point was not made on that case. In *Morrisson v. Gray*(b) I would also infer there had been some delay in transmitting the bill of lading. If there had been a custom among merchants, that the bill of lading should be sent by next post, that would alter the case; but though two or three witnesses have said that such was the proper course of proceeding, I find no rule of law to that effect. On these grounds I assume that the goods were put on board in pursuance of the contract, and I think the keeping of the bill of lading was not adverse to the right of *Wise* to receive them.

I think, therefore, the verdict should be set aside without costs, and that there should be a new trial.

Rule absolute for a new trial.

(a) M'Cle. & Rob. 673.

(b) 9 Moo. 484.

TUTHILL v. BRIDGMAN.

1841.

EXCHEQUER
OF PLEAS.
Tues. Apr. 28.

JOHN O'HARA applied on behalf of the plaintiff, for liberty to issue execution under the 3 & 4 Vict. c. 105, sec. 27, upon a rule of Court, bearing date 30th January, 1841, made on a motion under the 43 Geo. III. c. 140(a), sec. 13, where the defendant's application was refused with costs.

Application by a plaintiff for liberty to issue execution under 3 & 4 Vict. c. 105, upon a rule of court for payment of costs taxed and certified. Order made that the defendant pay the sum certified; which order was to be registered and execution to issue thereon.

John O'Hara.—Upon this rule the plaintiff is entitled to immediate execution; the costs have been taxed and certified to £25 1s. 6d. I am inclined to adopt this course, although, in the Courts at *Westminster*, the practice under the analogous *English* act(b) is, that execution issues without any previous application, provided the costs have been taxed and certified, and a demand has been made of the amount. These three requisites have been complied with in the present case, *Wallis v. Sheffield*(c).

COURT.—The order must now be that the defendant pay to the plaintiff the sum certified; you may then register this order, and issue execution under the statute.

(a) Ante, p. 132.

(b) 1 & 2 Vic. c. 110. sec. 18.

(c) 7 Dow. Pr. Cases, 793.

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v.

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I think, therefore, the verdict should be set aside with costs, and that there should be a new trial.

Rule absolute for a new

(a) M'Cl. & Rob. 673.

1841.

Jack d. DUC DE CASTRIES v. LAWLER.

EXCHEQUER
OF PLEAS.
Mon. May 3.

The attorney
for the lessor
of a plaintiff, in
ejectment, will
be allowed his
costs of
searches made
by him against
both *names* and
lands for the
purposes of the
cause, also for
his docket of
instructions to
the registrar.

R. J. LANE, on behalf of the lessor of the plaintiff, moved that *W. E. Hudson*, Esq., one of the taxing officers of the Court, should be directed to review and amend his taxation of the bill of costs in this cause, by reinstating and allowing therein the sum of *5s. 5d.*, late currency, part of the sum of *10s. 10d.* charged for fees paid the registrar, on searches made by him against *names and lands*, for the purposes of proceeding in this cause; and also by reinstating and allowing in said costs the sum of *5s. 4d.*, like currency, being the charge made for drawing a docket and copy of instructions to the said registrar, for making the said searches.

The affidavit of Mr. *Kift*, solicitor for the lessor of the plaintiff, stated that, having been employed to proceed by ejectment for non-payment of rent, out of the lands of *Ardo*, in the county of *Waterford*, he directed a search to be made in the registry office for acts by the tenants to whom the lands were demised, and those deriving under him, to affect the said lands, in order that all proper parties should be served with copies of such ejectment. He also stated that he had paid the registrar, for such search against the name of the defendant, the sum of *2s. 6d.*, and a like sum of *2s. 6d.* for searching against the said *lands* generally; and it having appeared that the tenant had executed a mortgage to a person named *Uniacke*, Mr. *Kift* paid the registrar two further sums of *2s. 6d.*, for like searches, as to the acts of *Uniacke*. The taxing officer, without any

objection being offered on the part of the defendant, struck off the amount of one-half the fees so paid by Mr. *Kift*, upon the said searches, stating that he did so upon the ground that a selection should have been made as to searching either against names or lands, but that it was not necessary to have searched against both. The affidavit further stated that the charges were incurred, *bonâ fide*, for the purpose of proceeding correctly in the deponent's duty.

1841.
CASTRIES
v.
LAWLER.

This has always been this gentleman's practice in the course of his business, and he would be guilty of great neglect if he did not make all the searches he has made. The act 2 & 3 Wm. IV. c. 87, expressly recognizes the right to search both against lands and names, and the officer has recommended us to bring the matter before the Court, as though the charges are trifling in themselves, the case involves a very serious question. The latter part of the motion is for 5s. 4d., for drawing the docket which is required to be presented at the registry office. [PENNEFATHER, B.—If the attorney is entitled to charge for his attendance, he is entitled to charge for his docket.]

BRADY, C. B.—The Court are all of opinion that this fee should be allowed. If an attorney, for the lessor of a plaintiff in ejectment, were to confine his searches to names only, or to lands only, and matter afterwards appeared which has escaped his knowledge, he would be liable to very serious consequences. A plaintiff, in ejectment, could never be sure that his judgment would not be set aside on account of such matter. We think, therefore, this application should be granted.

Mr. *Kift* has, very obligingly, favoured the reporters with the following

1841.

CASTRIES

v.

LAWLER.

note of the order made on a similar application, in the case of *Lovelan v. Cas. Ejector*.

"Monday, 27th November, 1826.

"Upon motion of Mr. *Smith*, of counsel on behalf of the lessor of the plaintiff, and on reading an affidavit:—it is ordered by the Court that *James Clancy*, Esq., one of the taxing officers, do review and amend the taxation of the plaintiff's costs, in this cause, by allowing therein the several sums paid for searches in the registry office respecting that part of the lands of Ballynarnaght, for which the ejectment, in this cause, was brought, and for the acts of the several persons interested therein, together with such fair and reasonable compensation as the said lessor's attorney shall appear entitled to, on the said several searches; and that the said taxing officer do also allow, in the said costs, the two said several sums of 2s. 1d., and 2s. 6d. charged for copies of the ejectment in this cause annexed respectively to the affidavits of service thereof, without further notice.

J. FARRAN.

J. J. KIRT."

1841.

EXCHEQUER
OF PLEAS.

Tues. May 20.

The Court will not grant further time to plead a dilatory plea.

BOND v. BELL.

ASSUMPSIT against one of the shareholders of the *Agricultural Bank*. *E. Corbet*, for the defendant, applied for time to plead; the declaration had been filed on the 28th April last. The plaintiff has been irregular in proceeding against this defendant—he should have proceeded against the public officer of the company, and we now desire further time, in order to plead in abatement.

BRADY, C. B.—If the plaintiff has been irregular, you should have taken advantage of it in another way. But the Court will not grant you more time for pleading a dilatory plea.

Refused.

WALL v. LIGHTMAN.

1841.

EXCHEQUER
OF PLEAS.
Wed. May 5.

ROBINSON applied for liberty to take a warrant of attorney off the file, for the purpose of entering judgment upon it in *England*.

A warrant of attorney allowed to be taken off the file to enter judgment on it in *England*: the plaintiff vacating the judgment here.

An application similar to this, made before Mr. Justice *Burton*, in the case of *Lindsay v. Rawlins*, cited in *Smythe's* Practice, p. 56. The warrant is in the usual printed form, which authorizes entering the judgment in any of Her Majesty's courts of record in *Ireland, Great Britain*, or elsewhere. And the plaintiff swears that the judgment will be wholly ineffectual here.

COURT.—Is the plaintiff content to vacate the judgment here?

This being acceded to, the application was accordingly
Granted.

1841.

EXCHEQUER
OF PLEAS.

Wed. May 5.

Where the attorney of the lessor of plaintiffs died after verdict, and the defendant, without serving plaintiffs with notice to elect an attorney, issued an attachment against the lessor of the plaintiff for the costs, the attachment was set aside, with costs.

DOE d. LAWLESS v. WELSH.

EJECTMENT.—The trial of the ejectment had taken place in the summer of 1839. In November, 1839, Mr. *W. H. Gregg*, the attorney for the lessor of the plaintiff died, and in Michaelmas term, 1840, a judgment of nonsuit was upon argument, obtained by the defendant. On 30th March last, a letter was written by Mr. *Jones*, the defendant's attorney, to *Lawless*, demanding a sum of £81 3s. 3d., the amount of the judgment of nonsuit and costs, for which an attachment had issued. On the 19th of April last, a conditional order had been obtained to restrain the defendant from proceeding in an execution to levy the amount of this judgment. *Bennett*, Q.C., now moved to make absolute this conditional order. He moved upon the affidavit of *Lawless*, which stated that his name had been used by Mr. *W. H. Gregg* without his authority, and that he had never heard, until March last, of the ejectment having been brought. No notice had been served on *Lawless*, to elect an attorney after the death of *Gregg*. It is quite settled that a person whose name used, without his consent, as lessor of a plaintiff in ejectment, cannot be made liable for costs.

Henn, Q. C., and *Freeman*, contra.

[PENNEFATHER, B.—We wish, first, to know whether you are regular in issuing this attachment after the attorney's death? The officer informs us that the practice is, after the death of the plaintiff's attorney, to serve the rule

to elect a new attorney on all the plaintiffs]. *Freeman* 1841.
 referred to 2 *Arch. Prac.* 756. The application to have *LAWLESS*
 the name of the party as a lessor of the plaintiffs struck out, *v.*
 should be made as speedily as possible. *WELSH.*

PENNEFATHER, B.—We think this proceeding not at all warranted by the rules of the Court. We shall disallow the cause shown against the conditional order, and as it is the practice of the Court, in all cases of irregularity, to give costs, we shall disallow the cause with costs. The Money levied by the slieriff must be handed over to Mr. *Lawless.*

Rule absolute, with costs.

LEWIS v. HYNES.

1841.
 EXCHEQUER
 OF PLEAS.
Thur. May 6.
 Where the
 affidavit of a
 process-server
 has been taken
 off the file for
 the purpose of
 prosecuting
 him for perju-
 ry, and he has
 been con-
 victed, the
 Court will not
 allow the de-
 fendant the
 costs of the
 criminal pro-
 ceedings.

An application had been made in this cause, on 30th April, 1840, to set aside the parliamentary appearance and subsequent proceedings; the process-server having sworn falsely to the service of the *capias*. On 9th May, 1840, an order was made that the affidavit of L. M., the process-server, should be taken off the file and handed to the clerk of the crown of the city of *Dublin*, in order that L. M. might be prosecuted for perjury, and the application to set aside proceedings had been ordered to stand over in the mean time. The process-server had been convicted. On 20th November, 1840, the defendant served notice of an application to set aside the proceedings, and for the

1841.

LEWIS
v.
HYNES.

costs, as well of the proceedings and former application to set aside, as of the criminal proceedings on the trial of L. M. To this the plaintiff's attorney replied by a notice of the 21st November, 1840, undertaking to vacate the parliamentary appearance and subsequent proceedings, and to pay the costs of the proceedings up to the service of this notice. The motion had stood over since last Michaelmas term.

Holmes now applied pursuant to the notice of the 20th November, and for the costs of this motion. We served notice on the plaintiff's attorney, that there was another person, of the same name and profession as the defendant, living in the same town; and called on the plaintiff to set aside the parliamentary proceedings, offering to enter a regular appearance if the plaintiff required it: this offer was refused, unless we would consent that the costs of the parliamentary proceedings should be costs in the cause. The defendant has had heavy expense in the criminal proceedings, which it appears have been properly instituted. We are therefore entitled to the costs of them, and are clearly entitled, as of course, to have the civil proceedings set aside, with costs.

Thomas O'Hagan, contra.—There is no question but that the defendant is not entitled to the costs of the criminal proceedings; and it is a very serious question whether he is entitled even to the costs of the civil proceedings. It never has been decided that the mere conviction of a process-server entitles the prosecutor to the costs of the proceedings requisite to obtain the conviction. In *Eggar v. Doherty*(a), this Court has expressed much doubt as to

(a) 2 Ir. Eq. Rep. 89.

the general principle, whether the costs of a conviction of a process-server should be visited on a defendant, but considered that there were special facts connected with that case, which rendered it competent for the Court to adjudicate upon the costs, without deciding the question on general grounds. This is not a case in which the Court should exercise its discretion against the plaintiffs; for it is sworn that the plaintiffs' attorney had taken pains to ascertain the character of the process-server, and endeavoured to get personal information respecting him. In *M'Kiernan v. Plunket(a)*, the same application was made as in the present case, and it was said that the Court never takes notice of the costs of criminal proceedings. The costs of the civil proceedings should not be given, because it appears that there were two persons of the same christian and surname, and of the same trade as the defendant, in the town of Gort, where he lived; besides the plaintiffs, by their notice of the 21st of November, offered to vacate the parliamentary appearance and subsequent proceedings, and pay costs under the application of the 9th May, and the costs up to the service of that notice. We offered to pay all costs except those of the criminal proceedings; and even should the Court give the costs of the civil proceedings against the plaintiffs, the defendant is not entitled to the costs of this motion.

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LEWIS
v.
HYNES.

BRADY, C. B.—This is substantially a motion for the costs of the criminal prosecution, but the authorities are against it, and the Court sees no reason to depart from them; and as the defendant has got only that which he was

(a) 3 L. R. O. S. 114. But see the learned reporter's note to *Egan v. Deane* ubi sup.

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LEWIS
v.
HYNES.

offered by the plaintiffs' notice, he must pay the costs of this motion.

Let the plaintiffs pay the costs offered by their notice of November, 1840, and let the defendant pay the costs of this motion.

1841.

EXCHEQUER
OF PLEAS.
Fri. May 7.

Lessee SHARPE v. BERGIN.

A. made a lease by indenture containing a covenant, that it was agreed, and these presents were upon the condition that the lessee "should not alien, sell, mortgage, assign, grant, convey, dispose of, let, underlet, or part with" the demised premises, or *per-*
mit the same to be occupied without the consent of the lessor; and if it should happen that the lessee should in violation of the said covenant, "alien, sell, mortgage, assign, grant, convey, dis-

EJECTMENT on a forfeiture of a lease, tried at the Spring assizes for the Queen's County, by the Lord Chief Justice. The lease, dated 1st March, 1832, was from *William Edward Flood Sharpe* to the defendant, demising part of the lands of *Roundwood*, containing 70A. 1R. 30P., for two lives or forty-one years concurrent, and contained the following covenant:—"And it is hereby farther de-
" clared and agreed upon by and between the parties to
" these presents, and the same are upon the express con-
" dition, that the said *James Bergin*, his heirs, executors,
" or administrators, shall not and will not alien, sell, mort-
" gage, assign, grant, convey, dispose of, let, underlet,
" or part with the said demised premises, or any part
" thereof, or his or their title and interest in and to the
" said demised premises, or any part thereof, *or permit the*
" *same to be occupied* by any person or persons whatsoever,
" other than and except his wife and children, without the
" previous consent, in writing, of the said *William Edward*

pose of, let, underlet, or part with the premises, or any part thereof," the demise should cease, or the lessee pay an increased rent.

A. permitted part of the lands to be occupied by a stranger. In ejectment for the forfeiture, *Held*, that this was not a breach of the condition, such as to avoid the lease.

Sharpe, his heirs and assigns, for that purpose first and obtained under his and their hand and seal. If it shall so happen that the said *James Bergin*, his heirs, executors, or administrators, shall, in violation of the said covenant, alien, sell, mortgage, assign, convey, release, dispose of, let, underlet, or part with the said premises, or any part thereof, to any person or persons whatsoever, other than and except as hereinbefore mentioned, that then and in such case this premises shall from thenceforth cease and determine, these presents, and every thing herein contained shall be absolutely null and void ; or at the option and election of the said *William Edward Flood Sharpe*, his heirs and assigns, that the said *James Bergin*, his heirs, executors, and administrators, shall be subject and liable and shall and will from thenceforth pay to the said *William Edward Flood Sharpe*, his heirs and assigns, a certain and additional yearly rent, equal to the amount of the rent herein-before reserved." The only evidence of breach of covenant on which the forfeiture was claimed was, that the cattle (sixteen or seventeen heifers) of *M^r Bride* had been seen grazing on part of the demised lands, and that *M^r Bride* had been tilling another small part of the lands not exceeding half an acre. Demand of ejectment was made, and the ejectment then brought.

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LESSEE
SHARPE
v.
BERGIN.

learned Chief Justice left the question to the jury.

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LESSEE
SHARPE
v.
BERGIN.

Macdonogh, for the defendant, had, on a former day, obtained a conditional order for setting aside the verdict in this case, and entering a nonsuit or verdict for the defendant, which he now moved to make absolute; and against which *Gilmour*, Q. C., and *Berwick*, Q. C., showed cause. If the tenant permitted the premises to be occupied by a stranger, the lease would become void, the words being "these presents are on the express condition." *Litt.* sec. 328, 330, 331. Had the proviso terminated with the first clause, and had the tenant permitted the land to be occupied, the landlord would indubitably have had a right to re-enter. The second clause certainly omits the words "or shall permit the same to be occupied;" but the effect of that omission would only be that if the tenant did permit the occupation of the premises by a stranger, the landlord could not elect to make him pay double rent, but would have his remedy only in evicting the estate. [PENNEFATHER, B.—No, he might bring his action of covenant. BRADY, C. B.—*Reddendo singula singulis*, the first part may be a covenant, the second part a condition. RICHARDS, B.—We have the lessor's own glossary for that.] The first clause certainly vested in condition merely. [PENNEFATHER, B.—No; in covenant merely. The word "condition" may amount to a condition; but, if restricted to a covenant, it amounts to a covenant merely.] The same words may operate as a covenant and as a condition; and can the parties, by calling this a covenant, take away the effect the law annexes to a condition? [PENNEFATHER, B.—I think they can.] The word "covenant" has been construed "condition" in several cases, *Harrington v. Wise*(a), *Earl Pembroke v. Sir H. Berkley*(b),

(a) Cro. Eliz. 336.

(b) Ib. 384.

Doe v. Jepson(a). [PENNEFATHER, B.—Your argument is, that by virtue of the first part of the condition, there was a right of re-entry reserved as to the whole ; but, in the second clause, they reckon up and specify certain things, in consequence of which the lease shall be void ; it would be nugatory to enumerate those things, if the former part were considered by the parties sufficient to make the lease void. The whole must be taken together.] In *Doe v. Meux*(b), where a lease contained a covenant to keep the demised premises in repair ; and a further covenant to keep in repair after certain notice of the repairs required, it was held that the landlord had an option to proceed on either covenant, though in that particular case there was a waiver of the forfeiture. Where there are two covenants in the same instrument, relative to the same subject matter, on the breach of one of them, the party injured may have his remedy independently of the other, *Roe v. Paine*(c). They also cited Co. Litt. 203, 6. *Simpson v. Titterwell*(d), *Doe v. Watt*(e).

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Macdonogh, contra.—It has been argued as if these clauses were two distinct and independant covenants, whereas the first clause is the covenant, and the second an enumeration of the acts which shall be such an infraction of it as to make the lease void ; thus the condition is qualified by the express arrangement of the parties themselves. A proviso may be restrained by a reference to

(a) 3 B. & Ad. 402.

(c) 2 Camp. 520.

(e) 8 B. & C. 308.

(b) 4 B. & C. 606.

(d) Cro. Eliz. 242.

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another clause, *Doe v. Godwin*(a). This is a covenant, not a condition, *Doe v. Philipps*(b), *Doe v. Stevens*(c); these covenants have always been construed by courts of law, with jealousy to prevent the restraint going beyond the express stipulation; *Church v. Brown*(d), *Crusoe v. Bugby*(e). The setting in con-acre is merely a mode of cultivation, and not a subletting of the lands, as Baron Pennefather has expressed his opinion in *Close v. Brady*(f) and that opinion is not contraverted by the Court of Common Pleas in *Lord Westmeath v. Hogg*(g). If the words "permit to be occupied" were thrown out, this would have been a proper mode of cultivation; and they do not occur in the latter clause. [PENNEFATHER, B.—The way in which it is to be taken for you is, that the jury may have found their verdict on those words.]

RICHARDS, B.—In this case I entertain some doubt, notwithstanding the opinions which have been formed by my learned brethren, as to the effect of this covenant or condition—call it which we will—for in truth it is both. If the covenant had rested at the first clause, it would have been an express condition, and on doing any of the acts there enumerated, the lease would have become void. But then it goes on, leaving out, in the second clause, the words, "or permit the same to be occupied," as if the lease had said, if the tenant shall do any of these things, except the permitting the premises to be occupied, then the lease shall be void. Now if the covenant had stopped there, I should also say that this indicated the intention of

(a) 4 M. & S. 265.

(c) 3 B. & Ad. 299.

(e) 3 Wils. 234.

(g) 3 Ir. Law Rep. 27.

(b) 2 Bing. 13.

(d) 15 Ves. 265.

(f) Jon. & Car. 186.

the parties to cut down the whole condition, and that it was not intended that the doing this thing should avoid the lease; but it goes on to give the lessor an option of insisting upon payment of an additional rent. Now that would not be the legal consequence of a breach of condition *per se*; a breach of condition would avoid the lease altogether, but a breach of this proviso would only give the landlord an option of avoiding the lease, or of making the party liable to additional rent. I entertain great doubt, therefore, whether this latter clause is more than an enumeration of the acts which give the landlord that option.

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BRADY, C. B.—I cannot come to any conclusion, but that this condition does not extend to any thing but what is stated in the latter part of the proviso. I think indeed the first words amount to an express condition; but we must look upon the whole as one instrument. That words of covenant may be used as words of condition, and *vice versa*, there is no doubt; and the only question here is, what was the intention of the parties in this clause. It appears to me that they never intended that a violation of this clause should amount to a forfeiture, and I would not hold this to be a forfeiture unless I could be certain that such was the intention. The parties set out by declaring that they are about to enter into a covenant or condition; immediately after this commencement come words of express condition—as no one can deny; but looking on this instrument, and seeing the connexion between the clauses of this sentence, I cannot form any other opinion than that the first part should be considered a covenant, and cannot suppose that the lessee should be held to have entered into a stipulation, making him liable to forfeiture by intend-

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ment of law, when he has excluded from the second clause these words, when enumerating the acts which shall make him so liable. And as the intention of the parties may have been that this agreement should vest in covenant merely I will not run the risk of violating that intention, and on the whole, I think there must be a new trial.

PENNEFATHER, B.—I adhere to the opinion I have already expressed, during the course of the argument, and although the doubt entertained by my brother *Richard* seems worthy of much consideration, I, nevertheless, think that the whole covenant must be construed in the manner already expressed by the Lord Chief Baron.

FOSTER, B.— We have here a covenant consisting of two parts, and for the breach of any members of the covenant contained in the second part, a power of re-entry is reserved to the landlord, but no such power is expressly reserved for breach of any of those contained in the first part. The first part contains words which are not in the second part. I think the landlord has fallen into some mistake in the wording of this deed, but as it now stands, I do not think the landlord can re-enter.

Rule absolute for a new trial.

M'DONNELL v. GRAY.

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EXCHEQUER
OF PLEAS.
May 7.

NAPIER moved that the defendant might be discharged from the custody of the sheriffs of the city of *Dublin*, under execution at the plaintiff's suit, and any subsequent detainers. The defendant stated in his affidavit that on the 20th of April last, he had left his residence in the County of *Meath*, for the purpose of attending, and being examined as a witness in a certain cause of *Bradford v. Stewart*, pending in the prerogative court. That on the 30th of April, he attended at the Prerogative Court, and was there examined as a witness; and on the 1st and 3rd of May he was also further examined as a witness in the same cause, and was sworn to attend to answer any cross interrogatories that might be submitted to him. The defendant attended the court on the 4th of May, and acknowledged his name and signature to the depositions given by him on the previous days; and the affidavit further stated, that on the 5th May, the defendant was proceeding as such witness to his proctor's residence, situated in *Henrietta-street*, for the purpose of receiving from them further instructions, and to ascertain on what day he should again attend for the purpose of being cross-examined, when, on his direct way to the residence of the proctor, he was arrested by the sheriffs of the City of *Dublin*, under a *capias ad respondendum*, which issued forth of this Court at the plaintiff's suit, marked for £32 8s. 7½d.

A country witness summoned to attend the Prerogative Court, and examined in chief, and sworn to attend again for the purpose of being cross-examined, is privileged from arrest while attending in town for the purpose of giving his testimony.

Armstrong, contra.—The defendant does not state where

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his residence was. His direct examination was concluded, and he does not say that any cross-interrogatories were lodged. He must show that he was privileged to stay in town. [RICHARDS, B.—It used to be the rule in Chancery, that a witness who had been examined was not considered to be discharged until four days after. He ought to be bound, at all events, to attend during whatever period the Prerogative Court allows for cross-interrogatories.]

Napier.—In *Selby v. Hills*(a), C. J. *Tindal* says, that it lies upon the plaintiff to show that the defendant was unduly availing himself of his privilege, and was out of his proper course, which it is here sworn was not the case. Even if this person had attended voluntarily as a witness he was protected, and might go where he liked, *Burke v. Higgins*(b), *Childerston v. Barrett*(c), *Arding v. Flower*(d). The same rule holds in the case of a witness attending before an arbitrator, *Rishton v. Nisbett*(e), *Ex parte Tillotson*(f). The cases have all been reviewed in *Babington v. Mahony*(g), in this Court. *Kelly v. Barnewall*(h).

BRADY, C. B.—In *Gibbs v. Phillipson*(i), Lord *Lyndhurst* lays it down, that if a witness had come from the country, for the purpose of being examined, he would be protected during the whole time of his remaining here, for the purpose of giving his testimony. We think this defendant must be discharged.

(a) 1 Moo. & Sc. 253.

(c) 11 East. 439.

(e) 1 Moo. & Rob. 347.

(g) 5 L. R. N. S. 232.

(i) 1 Russ. & Myl. 21.

(b) 2 Hog. 110.

(d) 8 T. R. 534.

(f) 1 Star. Rep. 470.

(h) Cooke & Al. 94.

MULEY and Others, Petitioners,
SMITH and Others, Respondent.

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EQUITY
EXCHEQUER.
Mon. May 10.

was a petition under the 1 Will. IV. c. 60. The S. being a trustee of leasehold and of stock, appointed by will A. & B. his executors, and died. A. & B. obtained probate to S., but never acted in relation to the trusts. On their refusal to do so, the Court appointed new trustees under 1 Will. IV. c. 60, s. 22. The executors of S. undertaking to replace the amount of a breach of trust committed by S. upon the trust fund.

stated that, by a certain lease dated the 20th of May, 1817, one *Henry Manning* demised to one *Patrick Campbell* certain pieces of ground, in and adjoining to *lane Street*, in the County of *Dublin*, for a term of years, at the yearly rent of £15 sterling, payable half and that the interest of *Patrick Campbell* in the same, which then produced a profit rent of £105 a year, had become vested in *Isaac Bomford*. That *Isaac Bomford* had, by his bond, bearing date the said 10th June, 1820, with warrant of attorney for confessing judgment, secured to *Philip Smith*, the principal sum of £1000 *Irish*, with interest at £5 per cent. That by deed, dated 10th June, 1820, reciting as aforesaid, *Isaac Bomford*, for the purpose of making a provision for the children of *Sophia Murphy*, one of the petitioners, and for the other considerations therein mentioned, assigned the said premises to the said *Philip Smith*, residue of the said term, granted by the said lease, subject to the rents and covenants therein reserved and contained. And that it was thereby declared that *Philip Smith* should (after payment of the head and other outgoings payable out of the said premises) pay the yearly profit rent arising out of the same, and interest, dividends, and annual produce of the said premises to the petitioners, *Rosina Muley* and *Sophia Murphy*, in equal shares during their joint lives; and after the

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death of the said *Rosina*, in the lifetime of the said *Sophia* should then pay the entire of the head rents and profit interest and dividends to *Sophia*, during her life; and, after her decease, then (subject to the life interest of *Rosina*, in the one moiety of the said rents, profits, and dividends) that the said *Philip Smith* should stand possessed of the said trust premises, for the benefit of the children of *Sophia*, as therein mentioned.

The petition further stated, that by a certain settlement, dated the 18th June, 1828, and executed upon the marriage of the petitioner, *Sophia*, with *Arthur Murphy*, since deceased; *Isaac Bomford*, and the petitioner, *Sophia*, according to their estates and interests therein, assigned to the said *Philip Smith*, one undivided moiety of the said premises, subject to head rents and covenants as aforesaid; and that it was thereby declared that the said *Philip Smith* should, during the joint lives of the petitioners, *Sophia* and *Rosina*, pay one moiety of the clear yearly profit rents, and of the interest and dividends, on the said bond; and, after the death of *Rosina*, should pay the entire of the said profit rents, interest, and dividends, to the said *Sophia Murphy* to her separate use; and upon the death of *Sophia* and *Arthur Murphy*, then, that the said *Philip Smith* should stand possessed of the said trust funds and premises, for the benefit of the children of the said intended marriage, in manner therein particularly mentioned.

And that by a certain indenture of mortgage, made the 23rd January, 1830, between the said *Arthur Murphy* of the one part, and the said *Isaac Bomford* of the other part, reciting a certain indenture of the 22nd January, 1830, whereby *Thomas Muley*, and the pet

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tioner *Rosina*, then his wife, assigned to the said *Arthur Murphy*, his executors, administrators, and assigns, certain messuages, lands, tenements, and premises at *Kingstown*, in the County of *Dublin*, for the residue of the several terms of years for which the said premises were respectively held, (subject as therein mentioned,) it was witnessed that in consideration of £500, the said *Arthur Murphy* assigned to the said *Isaac Bomford*, the said messuages, lands, tenements, and hereditaments, for the residue of the several terms for years, for which the said several premises were respectively held; except the last half year of the said several and respective terms, discharged from or indemnified against the rents and covenants reserved and contained in the said indentures of lease, under which the same were respectively held; subject to a proviso for redemption on payment of £500 and interest. And that by indenture, dated the 16th March, 1830, *Isaac Bomford* assigned over to the said *Philip Smith*, his executors, administrators, and assigns, the said messuages, lands, and premises at *Kingstown*, for all the estate and interest therein then vested in *Isaac Bomford*, subject nevertheless to redemption; and also the said principal sum of £500, secured by the said mortgage and bond collateral therewith, in trust, to pay the yearly interest to accrue upon the said sum of £500, to *Sophia Murphy*, during her life, for her separate use; and after her decease, in trust, for her children, by the said *Arthur Murphy*, or any after-taken husband, at the times and in the manner therein contained.

The Petition further stated, that *Isaac Bomford* died about the 19th July, 1837, and that his executors, on the

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13th August, 1837, paid off to the said *Philip Smith*, the said sum of £500, late currency; and that the said sum was invested in the purchase of £459 2s. 2d., 3 per cent consols; and that *Arthur Murphy* since died, leaving *Sophia*, his widow and three children, (also petitioners in this matter,) him surviving. That *Sophia Murphy* having occasion for a sum of £100, applied to the said *Philip Smith*, to lend her the same sum, out of the said trust funds, which he did, on having the repayment secured by the bond of the said *Sophia Murphy*, and by an insurance on her life; thereby leaving £348 16s. 4d., stock, remaining in his name. *Philip Smith* died in November last, and by his will appointed his wife, his two sons, (the respondents in this matter,) his executors and executrix; the sons alone proved the will. The petition alleged that the respondents never acted, and now refused and declined to act in the execution of the aforesaid trusts, created by the said several deeds; and in particular that the petitioner, *Sophia Murphy*, had, on the 9th January last, applied to them to receive the dividends then due, upon the said sum of £348 16s. 4d., standing in the name of the said *Philip Smith*, and to pay the same to the petitioner; with which request the respondents refused to comply. I further stated that it was necessary for the protection and preservation of the interest in the premises in *North An Street*, and in *Kingstown* aforesaid, and to enable the petitioners to receive the rents of the said premises, and the interest on the said mortgage debt, as well as the dividends on the said stock that a new trustee should be appointed. And that the respondents were willing to assign their interest in the trust premises under the direction of the Court, to any person who shall be appointed such new trustee, and were willing, if directed by the

Court, to replace or reinvest the said sum of £110 5s. 10d. of stock.

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The petition prayed that it might be referred to the chief or second remembrancer, to inquire and report whether the said *Anne Smith, Samuel Smith, and Edward John Smith*, or any or either of them, are, or is possessed or entitled to the several trust funds, and premises, herein-before particularly mentioned, as a trustee or trustees within the intent and meaning of the Act, 1 Will. IV. c. 60, and if so, that the said chief or second remembrancer might approve of a fit and proper person, or fit and proper persons to be appointed a trustee or trustees in the place of the said respondents, to act in relation to the trusts contained in the said several herein-before in part recited indentures, or such of them, as were subsisting and capable of taking effect, and that the respondents, or such of them, as should be reported to be such trustees as aforesaid, should be directed to assign and transfer the said several trust premises, according to the different natures and qualities thereof respectively, to the person or persons that should be approved of, as a new trustee or trustees as aforesaid, and that the said chief or second remembrancer might approve of a fit and proper deed or deeds of assignment and transfer to be executed by the respondents, or such of them, as should be so reported trustees as aforesaid.

Mr. *J. H. Orpen* moved according to the prayer of the petition. If there was a power of appointing new trustees in this settlement, Mrs. *Murphy* might have petitioned the Court; there is no such power in the settlement; but the 22nd section of 1 Will. IV. c. 60, provides for the

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appointment of such trustees. [RICHARDS, B.—This case is not within the act; you have not made a written request of the executors to act, or tendered a deed to them.] That is not necessary to bring within the statute in such cases as are contemplated by the previous sections. The 9th and 10th sections are applicable here. *Johnson v. Ankette*(a), is a very similar case to this.—*O'Keeffe v. Thompson*(b).

PENNEFATHER, B.—The case of *O'Keeffe v. Thompson* was very well considered by the Court, and came before us several times. The Court thought that there were some grounds for fearing that the funds might be misapplied; that will account for the peculiar words of the order. However, after some time we were satisfied that the parties meant fairly. I am persuaded that the legislature intended this act to have as extensive an application as possible. But, certainly, if we were disposed to be hypercritical, we cannot conceal that we might prevent the act from having almost any operation at all. We would not, however, be exercising our discretion wisely in restraining the operation of the statute, and we must give it as useful a construction as possible, and that this is a case within its operation.

Barons FOSTER and RICHARDS concurred.

Reference made as prayed; the respondents undertaking to replace the £100 lent to Mrs. *Murphy*.

(a) 5 L. R. N. S. 201.

(b) 6 L. R. N. S. 253.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER

IN IRELAND,

IN TRINITY TERM, IN THE FOURTH YEAR OF QUEEN VICTORIA,
AND THE SITTINGS AFTER.

EGAN v. KIRKALDY.

1841.

EXCHEQUER
OF PLEAS.
Mon. May 24.

THIS was an action of trespass, brought by one of the tenants of Lord *Clanrickarde*, for the purpose of trying a right of way. Before the commencement of the action, Lord *Clanrickarde* had written a letter to the defendant's agent, in which, though he strongly disavowed his own interest in the suit, he admitted that he would pay the expenses of the plaintiff to enable him to contest the point.

Where trespass was brought by a tenant of A. to try a right of way over A.'s property, and A. had written a letter to the defendant's attorney, disclaiming his own interest in the suit, but admitting that he would pay the expenses of the plaintiff, (who was a pauper,) in

Keatinge, Q. C., now moved that the proceedings in this suit should be stayed, until Lord *Clanrickarde* should give order to enable him to contest the point: The Court stayed the proceedings until A. should give security for costs.

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security for costs. The action has been brought at the suggestion of Lord *Clanrickarde*, and the plaintiff has been selected because he is a pauper. Lord *Clanrickarde*, being the owner in the fee of the estate, would be most benefitted by the result of the action if the plaintiff were to succeed; it is, therefore, proper that he should be made liable to the costs of it. He cited *Ball v. Ross*(a), *Tenant v. Brown*(b), *Hearsay v. Bezuchamp*(c).

J. H. Blake, Q. C. *Fitzgibbon*, and *C. Burke*, contra.—The Court has not any jurisdiction to make Lord *Clanrickarde* liable to the costs; his lordship's letter is a disavowal of any personal interest, and only promises to pay the expenses of one side; *Hayward v. Giffard*(d). If the plaintiff had a right, such as is claimed in this suit, he surely was entitled to come here to establish it; and Lord *Clanrickarde*, if his conduct has been wrong in supporting his tenant, may be proceeded against for maintenance. [FOSTER, B.—The question seems to me to be, whether Lord *Clanrickarde* has, by his letter, made this action his own, and made himself responsible by it. If he had not interfered the action certainly would not have gone on.]

Monahan, Q. C., in reply.—*Ball v. Ross* was a stronger case than this. In *Hayward v. Giffard*, the parties had gone to trial, and there had been a verdict for the defendant: Lord *Abinger*, indeed, said that the Court had no authority to make an order for payment of costs against a person who was not a party to the record; yet,

(a) 1 Scott, N. R. 217.
(c) 7 Scott, 477.

(b) 5 B. & C. 208.
(d) 4 M. & W. 194.

the Court would have made the order for staying proceedings, had the application been made in the way in which we now make it. Our motion does not require the Court to assume a jurisdiction after verdict, but only that the proceedings may be stayed until security is given for costs.

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BRADY, C. B.—The Court, though unwilling to place any impediment in the way of a party who has any right to assert, nevertheless considering the letter of Lord *Clanrickarde*, is of opinion that this is an action which, if not brought by Lord *Clanrickarde* himself, is at least instigated and countenanced by him. That being the case, I think we must exercise, as we often do, the jurisdiction we possess, and order these proceedings to be stayed until Lord *Clanrickarde* gives security for costs.

FOSTER, B.—Coincided in opinion with the Lord Chief Baron.

RICHARDS, B.—Though not willing to dissent from the opinion of the rest of the Court, I still entertain some doubts as to this case. There is a case not cited in argument, *Morgan v. Evans(a)*, which is rather a strong one against this motion; however, I am unwilling to differ from the rest of the Court; and, upon the whole, prefer coinciding in its judgment.

Motion granted(b).

(a) 7 Moo. 344.

(b) See *Sheehy v. Dorman*, 2 F. & S. 238.

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EXCHEQUER
OF PLEAS.

Mon. May 24.

MURPHY v. BELLEW.

Where B. evicted M. by title paramount, and an award was made on a submission to arbitration, "to declare what amount may be the profits to be derived by B. from the expenditure of M., with allowance for ditching and draining, as well as building and manure, so as to extend its benefits to any future crop;" and it was awarded that B. should give M. £107 for profit, calculated to accrue to B. from M.'s improvements, and that B. should give M. the use of the house he occupied to a certain day, on which M. should give to B. possession of the premises. Held, that this award was not invalid, though relating to an interest in land, but was sufficiently supported by the submission.

ASSUMPSIT on an award: Plea, non assumpsit. Trial of this case, before Mr. Justice *Burton*, at the sittings for the county of *Louth*, in 1840, it appeared a person named *Curran*, held about eighty acres of land on Lord *Ferrard's* estate, under the defendant, who had a lease of them for one life; and that the plaintiff was an under-tenant to *Curran*, and had laid out a considerable sum on the lands, under a misapprehension of *Curran's* title. *Curran's* interest expired during the summer of 1839, and he was ejected by the defendant. An arbitration having been agreed upon between the parties to this case in order to ascertain the amount of compensation to be made to the plaintiff in respect of his expenditure, an award was drawn up and executed by the parties, which was in these terms:—"The award to be made, by the arbitrators, between *James Bellew* and *Nicholas Murphy*, is to declare what amount may be the profits to be derived by *Bellew* from the expenditure of *Murphy*, with allowance for ditching and draining, as well as all building and manure, so as to extend its benefits to any future crop; *James Bellew* named *C. Carolan*, and *Nicholas Murphy* named *Thomas Boylan*, and should they not agree in their award, they are to call in a third person to decide.—Signed *J. Milling*, who also viewed the land; and shortly after the following award was made:

"The award come to by the arbitrators between *Bellew* and *Murphy* is, that *Bellew* should give *Murphy* £107 7s., on account of profit calculated to accrue to *Bellew* from the extent of *Murphy's* improvements: That *Bellew* give *Murphy* the use of the dwelling-house and offices he occupies to the 1st of May next. That, on that day, *Murphy* give up to *Bellew* the possession of said premises, leaving them in the same repair as at present."

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The defendant having refused to comply with this award, the present action was brought and the issue tried. The learned judge refused to nonsuit the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that there should be a nonsuit entered on the following objections:—1st, That inasmuch as the matters in dispute, referred to the arbitrators and umpire, related to an interest in land, and that there was no sufficient agreement in writing given in evidence by the plaintiff, the plaintiff should be nonsuited^(a). 2nd, That the award extended to matters not within the terms of the submission, and, therefore, was invalid. The jury found a verdict for the plaintiff. A conditional order having been obtained, on a former day, that the verdict had for the plaintiff should be set aside, and a nonsuit entered,

Gilmore, Q. C., with whom were *Whiteside* and *Napier*, now moved to make that conditional order absolute. An award may, in some cases, be good in part and bad in part; but in this case the parts of the award are inseparable, and as the arbitrators had no power to award the giving up possession of the lands on the 1st May, the award must be bad

(a) See 7 Wm. III. c. 12. sect. 2. *Irish*.

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altogether. The parts of the award are inseparable ; for the arbitrators would not have awarded £107 to the plaintiff, if they had not imagined that they had also power to award that the plaintiff should, on his part, deliver up possession of the lands. The delivery of possession of the land was the consideration for the payment of the sum awarded. This is a contract concerning an interest in lands which is void, as there is no submission in writing as to arbitration to this point. If the defendant had paid the £107, and the plaintiff had refused to deliver up the possession, what remedy could the defendant have had upon the submission and award, since there should have been a written submission to satisfy the statute of frauds? If then the provision of the award for giving the use of the dwelling-house, and the delivery of possession of it on the 1st of May, were invalid for want of a written submission, the defendant had no consideration for the payment of the £107, and, therefore, the two branches of the award must be inseparably connected. The giving up the possession must then have been part of the consideration for the award ; and even if it *might* have formed part of the consideration, that is sufficient to render the award invalid, *Secombe v. Babb*(a). An award cannot if bad altogether, become valid by matter *ex post facto* *Jackson v. Clarke*(b). The party is bound by his contract only if there be a consideration for it ; the doctrine of performance cannot be admitted in a Court of law, *Ex Falmouth v. Thomas*(c).

Holmes and Tomb, contra.—The declaration seeks only the amount given by the umpire on a view of the improvements, without considering more ; it does not appear, from

(a) 6 M. & W. 129.

(b) M'Cl. & Y. 200.

(c) 1 Cr. & Mee. 89

the award, that the arbitrator considered the question of delivering up possession in awarding that sum.

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BRADY, C. B.—Here was a submission, signed by the parties, to arbitration, as to the value of certain improvements, made by the plaintiff, on lands to which the defendant was entitled. The arbitrators state in their award, that the amount of £107, awarded by them, is given for the value of the improvements; and though they certainly go on to award another thing which they had no power to do, yet it appears to me that the award is good upon the whole.

Rule discharged.

DURANT v. POTTER.

1841.
EXCHEQUER
OF PLEAS.
Mon. May 24.

CASE for maliciously overmarking a writ of execution.—Where, in an action brought in 1839, against the public officer of a banking company, for overmarking a writ of execution in 1838, the plaintiff produced a certificate under the 6 Geo. IV. c. 42, of a return, sworn 28th March, 1838, to prove that the defendant was the public officer of the company, and it appeared that no registry, as required by the act, had been made of the officers of the company after 1838. Held, that this, coupled with the certificate, was evidence to go to the jury, of the defendant being such public officer when the action was brought.

Plea, not guilty. The defendant in this case had been the public officer of the *Limerick National Bank of Ireland*; a banking company registered *eo nomine* in the stamp office, pursuant to the 6 Geo. IV. c. 42. The cause of action accrued in November, 1838, and the action was brought in *Trinity Term*, 1839, against the defendant, as the public officer of

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that bank, pursuant to the 10th section of that act. On the trial of this case before Mr. Justice *Crompton*, the plaintiff produced in evidence a certificate obtained from the stamp office in *Dublin*, (pursuant to the 7th section,) and dated 16th July, 1840, but sworn 28th March, 1838, pursuant to that act(a), as proof that the defendant was

(a) The 6th section enacts, " that between the 25th day of March in any year, and the 25th day of March following, an account or return shall be made out by the secretary, or some other officer of every such society or co-partnership, and shall be signed by such secretary, or other officer, and shall be verified by the oath of such officer, taken before any justice of the peace, (and which oath any justice of the peace is hereby authorized and empowered to administer according to the form contained in the schedule No. 1, to this act annexed; and in every such account or return there shall be set forth the style, name, or firm of such society or co-partnership; and also the names and places of abode of all the partners concerned or engaged in such society or co-partnership as the same respectively appear on the books of such society or co-partnership, and the firm and name of all and every bank or banks established, or to be established, by such society or co-partnership; and also the names of two or more individuals of such society or partnership, who shall be resident in *Ireland*, each, and every of whom shall respectively be considered as a public officer of such society or co-partnership; and the title of office or other description of every such individual respectively in the name of any one of whom such society shall sue and be sued as hereinafter provided; and also the name of every town and place where any such bills or notes shall be issued by any such society or co-partnership, or by any agent or agents of any such society or co-partnership; and every such account or return shall be produced at the stamp office in *Dublin*, and an entry and registry thereof shall be made in a book or books to be kept for that purpose, at the said stamp office, by some person or persons to be appointed for that purpose, by the commissioners of stamp duties; and if, after the passing of this act, any such society or co-partnership shall omit or neglect to deliver, at the stamp office, in *Dublin*, such account and return as is by this act required, such society or co-partnership shall, for each and every week they shall so neglect to make such account and return, forfeit the sum of £500."

Sect. 7. " And be it further enacted, that whenever any entry and registry of the firm and name of any such society or co-partnership, shall be made at the stamp office in manner aforesaid, at any time between the 25th day of March in any year, and the 25th day of March following, a certificate of such entry or registry shall be granted by the said commissioners of stamps, or by some person deputed and authorized by the said commissioners for that purpose, to the society or co-partnership, by or on whose behalf such entry or registry shall be made, and such certificate shall be written on vellum, parchment, or paper, duly stamped with the stamp required by law for certificates to be taken out yearly b]

er of the banking company. It appeared also that *Merick National Bank of Ireland* ceased to carry on in 1838, and that after that year no registry of ers, &c., such as is required by the 6 Geo. IV. was ever made in the stamp office. A witness *Reynolds* swore that *Potter* had ceased to be the f the bank in the end of 1838, and that another had been appointed. The counsel for the defen- jected that this certificate of the defendant being a officer of the bank, was for the year previous to that h the action was brought, and, therefore, was not e to show that the defendant was the public officer bank as stated in the declaration. The learned as of that opinion, and nonsuited the plaintiff. A nal rule to set aside this nonsuit had been l, against which *M. Baker* now showed cause.

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r.—The defendant should have pleaded specially e was not properly sued in his representative

er or bankers in *Ireland*, and a separate and distinct certificate, rate piece of vellum, parchment, or paper, with a separate and tamp, shall be granted for, and in respect of, every town and re any such bill or note shall be issued by any such society tnership, or by any agent or agents for, or on account of, ty or co-partnership; and every such certificate shall specify r firm, style, title, or name of such society or co-partnership, ich such notes are to be issued; and also the name of or place, or the several towns or places where such e to be issued; and the christian and surname, and place , and title of office, or other description of the several ls named respectively as the public officers of such society or rship, in the name of any one of whom such society or co-part- hall sue and be sued; and every certificate shall be dated on n which the same shall be granted; and shall have effect, and in force from the day of the date thereof, until the 25th of llowing, both inclusive, and no longer, and shall be sufficient of the appointment and authority of such public officers ely." Sec. 10, declares that all actions to be instituted against ty, &c., shall be commenced "against any one of the public offi- inated as aforesaid, for the time being, of such society or co- ip," as the nominal defendant on behalf of such society.

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capacity ; he cannot now rely, under the general issue upon his not being such representative of the banking company. We proved, on the trial, that this was the last certificate of any registry of this banking company in the stamp office ; and can it be contended that it was the intention of the legislature to leave the public without a tangible person to be sued in the name of the company, the company had neglected to re-register pursuant to the act ? The act says that *the certificate* shall be in force for year only ; but it does not state that the *registration* shall be in force only for that period. The case of *Edwards v Buchanan*(a) will probably be relied upon by the other side ; in that case an action was brought by a banking company, and a certificate of the return to the stamp office was produced, to show that a return had been made by the company of the appointment of their officer for 1831. That action was commenced in 1831. It was held, by Lord *Tenterden*, that the copy of the return made to the stamp office, pursuant to the statute, would not answer the purpose of showing that the defendant was the officer of the company, in 1830 ; but the point decided was, that the return to the stamp office was not the only admissible evidence of the defendant being one of the public officers ; therefore the principle of that case is not applicable here. [BRADY, C. B.—The defendant, in his plea, entitles himself officer of the bank. He says, in the body of the plea, “and this defendant, *R. Potter*, in his own proper person comes and says, that neither he nor the said co-partnership is or are guilty of the said grievances above alleged against him.” Surely he cannot say, after that, that he is not the public officer ? The

(a) 3 B. & Ad. 788.

plea appears to me to conclude the defendant on this part of the case].

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Fitzgibbon and West, Q. C., contra.—The plea is entitled just as the declaration is. [RICHARDS, B.—Surely he might have said that he was sued as the public officer]? The defendant does not say, that at the time the plea was filed, he was sued as public officer. [BRADY, C. B.—If he had been sued as an executor, and had called himself an executor in his pleading, could he have denied his being so?] No; but that is because there is a peculiar plea appropriate to the denial of an executorship. The title of the plea forms no part of the record; it is struck out when making the record up, and is mere surplusage; and if the plaintiff did not prove his case the nonsuit was right. [RICHARDS, B.—Could the plaintiff have supposed that such an objection would be made after such an admission as this?] It might as well be said that he need not bring down the registry of his being a public officer at all. [RICHARDS, B.—I think there was evidence to show that *Potter* was the public officer of the company; first, there is the certificate that he was such officer in 1838, and next, evidence of a search, which showed that no other person was afterwards registered as such officer.] In the 10th section, which enables the plaintiff to sue the public officer, the words “for the time being,” clearly mean *for the present time*; and the act requires that the officer for the time being should be sued. There is no substantial difference between the 10th section of the *Irish* and the 9th section of the *English* acts. The plea of not guilty puts the plaintiff on proof of all the material allegations in the declaration, and the plaintiff has failed in that proof.

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BRADY, C. B.—We think that there was, in this case, sufficient evidence to go to the jury that *Potter* was the public officer of this banking company, at the time when this action was brought. I do not mean to lay down principles what I have thrown out in the course of this case to elicit information; but only to say, that the evidence was such as ought to have been sent to the jury.

RICHARDS, B.—I also am of opinion this nonsuit should be set aside. I think there was evidence that the defendant was the public officer of the company when the action was brought. The certificate of his registry, as such officer, has been produced to show that he was such public officer in 1838; and it appears, from searches made in the stamp office, that no subsequent appointment of any such public officer was made; I think the fair inference then is that he continued to be such officer. It is true that *Mr. Reynolds* states that this gentleman ceased to be one of the public officers of the company in the close of the year 1838; but the act of parliament provides for the appointment of another officer, and his registration in the proper public office. On search made in that office, it appears there was no other person ever nominated to that situation. We consider, therefore, that as no change of such public officer appears to have been made, there is evidence of the defendant continuing to fill that situation, and that the nonsuit should be set aside. Moreover, when *Potter* comes in to plead to this action, he entitles his plea in the words, “*Robert Potter*, one of the public officers, &c.,” and does not say that he is *sued* as one of the public officers, &c. I think, on these grounds, the nonsuit should be set aside.

Rule accordingly.

DOE d. ASHE v. LEHANE.

1841.

EXCHEQUER
OF PLEAS.
Tues. May 25.

EJECTMENT against an overholding tenant on notice to quit on the 1st May, 1840; demise 10th May following. This case was tried before Mr. Serjeant *Greene*, at the summer assizes. The first witness produced for the plaintiff, deposed to having served a notice on the defendant, *Lehane*, tenant in possession of the lands, the subject of the ejectment; and stated that he had explained to him, that the notice was to quit on the 1st May next after the date of the notice. The tenant made no objection to this notice, but said that he had "a longer term." The gale days were proved to be November and May. There was some conflicting evidence as to the commencement of the tenancy; the tenant having set up as a defence, that the tenancy commenced in November; and a witness for the defendant, having stated that the defendant's occupation commenced in November, 1812, but that he was not to be under rent until the following May, but should pay a certain small sum for the grazing of the land. The learned judge left it to the jury to say whether the tenancy commenced in May or in November. The jury found a verdict for the plaintiff. A conditional order to set aside the verdict had been obtained, against which *Collins*, Q. C., now showed cause.

In ejectment on the title, the plaintiff proved service on the defendant, of a notice to quit on the 1st May following, and that the notice at service had been explained to the defendant, who did not then object to the notice, but said "he had a longer term." The gale days were proved to be in November and May; but there was conflicting evidence as to the time when the tenancy commenced.

Held, that the tenant was not thereby estopped from setting up as a defence that the tenancy commenced in November.

The party who was served with notice to quit, did not object that his tenancy did not commence on the 1st of May. There are cases which decide that if a man say

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DOE d. ASHF
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LEHANE. his tenancy commenced on a particular day, he shall be estopped from denying it afterwards, *Thomas v. Thomas*(a), *Doe v. Forster*(b), *Doe v. Woombwell*(c), *Oakapple v. Copous*(d). [BRADY, C. B.—On both sides it appears that the occupation commenced in November; it must be taken that the occupation was in the character of a tenant].

Henn, Q. C. and *Freeman*, contra. The true test of the time of the determination of the tenancy is, at what time did the defendant enter, and not at what time did he come under rent. It is stated, by the defendant's witness, that he commenced in November, but was not to be subject to rent until the next May. The question has frequently arisen in *England*, when a tenant enters at different times upon different parts of the farm, and the rent is reserved at different gale days, when did the tenancy commence? It is clearly settled that the time of commencement of a tenancy is the time of entry on the *substantial* part of the demised premises, *Doe v. Watkins*(e); and the time is not necessarily to be reckoned from the period at which the rent accrues. November, therefore, was the time in which the defendant's tenancy commenced. The question of entry was for the jury; *Doe v. Howard*(f). But if the rent days established the commencement of the tenancy, there would be no question for the jury. If the tenancy commenced in May, no benefit could have been contemplated for the tenant from the possession of the land for the previous half year. From the entry of the tenant he had all the rights and liabilities of a person in possession,

(a) 2 Camp. 647.
(c) 2 Camp. 559.
(e) 7 East. 550.

(b) 13 East. 405.
(d) 4 T. R. 361.
(f) 11 East. 498.

Darbey(a), and was entitled to notice to quit, ^{1841.}
v. Copous(b), *Doe v. Foster(c)*. The tenancy ^{DOE d. ASKE}
 from the time when the tenant enters, though ^{v.}
 between the usual quarter days, *Kemp v. Derrett(d)*,
Hudleston(e). ^{LEHANE.}

Q. C., in reply.—Mr. *Henn* has cited and cases where the tenant entered at different different portions of the lands in his tenancy; the substantial entry was on the first of May. contend that payment of rent from a particular re than *prima facie* evidence of tenancy from

But where a tenant enters in the middle of a id pays rent for the period of his enjoyment, the rises whether the rent is to be reckoned from ay preceding the entry, or from that subsequent : *v. Johnson(f)*, *Doe v. Stapleton(g)*. The ex- used by the defendant were evidence to go to the the case of *Doe v. Woombswell*. There is nothing that there was any tenancy before the first of re was a mere general occupation of the land by , and a licence to him to take the grazing; but : no payment of rent for any period between : and that time.

, C. B.—We are of opinion that the verdict in should be set aside, as we do not, under the cir- s, consider it satisfactory. There was evidence

R. 163.
 st. 406.
 t C. 292.
 t P. 275.

(b) 4 T. R. 361.
 (d) 3 Camp. 510.
 (f) 6 Esp. 10.

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of a notice to quit on the 1st of May, duly served upon the tenant. It has undoubtedly been held that the silence of a defendant on the service of a notice to quit, is evidence to go to the jury as to the commencement of the tenancy; but I always have thought that evidence of that kind was to be received with extreme caution, considering the class of persons by whom, and on whom, such notices are generally served. But the notice here is not unobjected to by the defendant, for, on the contrary, we have the declaration of the tenant that he conceived he had a longer term. The word "term," to a legal mind, conveys certainly a definite idea; but it is also quite consistent with the defence the tenant now sets up. I think the expression affords scarcely any information in the present case. It appears, unequivocally, that possession was given in the year 1812 to the defendant, in the character of a tenant, and in that character he continued ever since. There is no evidence that possession was given in any other way; and possession having been given in November, we ought to presume that the tenancy commenced in November. To meet this presumption it is alleged, that the rent commenced in May; but there was some dealing, or render, or return, for the time between November and May. If this was a render of rent, it is clear that the tenancy commenced in November. So, if there had been an agreement between the parties that nothing was to be charged for the first half year, between November and the following May or if there was a release of the rent for that period, it would likewise follow that the tenancy commenced substantially in November. Upon the whole case it appears that the jury found a verdict for the plaintiff; but as the mere fact of rent being paid, as from May, is not sufficient to counterbalance the presumption of law of the commencement of

the tenancy in November, we think the verdict must be set aside ; but the defendant must pay his own costs.

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RICHARDS, B.—It, at one period of the argument, occurred to me that the agreement was, that the defendant was to commence his tenancy on the 1st of May, and that the occupation during the intermediate time from November until May, should be considered as an independent bargain for the grazing of this farm, up to the 1st of May. But I do not think the evidence, as reported by the judge, brings the case to that ; nor do I think the jury could form that conclusion from the evidence as reported. Then, taking it that the tenant went into possession subject to rent, he stipulated that he should hold the lands from a particular period. Now it is very important to both landlord and tenant, that they should know at what period the tenancy commenced ; for, if the tenant is to go out in November, he insures to himself a full crop ; but if, on the other hand, he is to go out at May, the landlord gets the benefit of all. Now here we have the tenant going into possession previously to the 1st of May ; and there is nothing to show that he did not proceed to deal with the land as tenant ; he might have prepared it and sown his crops. He did not indeed pay rent except from the 1st May. It is said that there was some arrangement as to the previous half-year's rent ; but there is no evidence of it. I think it behoved the landlord, who had given possession in November, to have adduced clear and unequivocal evidence of any special agreement, if such had existed. He relies on the fact of no rent having been paid for the land between November and May ; but that fact is fully accounted for by the land being out of heart. Under

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these circumstances I think the weight of evidence is in favour of the case of the tenant. As to the circumstances attending the service of the notice to quit, I think the Courts have gone quite far enough in binding tenants by loose observations made by them on the service of such notices made before process-servers, who are often not faithworthy; and in this country especially, where tenants are not generally well informed persons, I think we ought not to construe such expressions adversely to the tenant: for these reasons I am of opinion that the verdict should be set aside.

Rule absolute for a new trial. No costs of this motion.

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EXCHEQUER
OF PLEAS.
Wed. May 26.

Lessee FREWEN v. AHERNE.

A tenant who has stated to his landlord that his tenancy commenced in March, shall not be permitted, at a trial in ejectment, to set up that it commenced in November.

An authority to receive rents and evict certain persons is not a general authority to determine tenancies.

EJECTMENT on the title for twenty acres of the lands of *Sleeview*, in the county of *Cork*: the demise was laid on 26th March, 1840. At the trial of this ejectment, before Mr. Sergeant *Greene*, at the *Cork* summer assizes in 1840, the plaintiff proved that the premises in question were formerly the estate of *Edward Hale Adderley, Esq.*; and that he, on the 17th June, 1826, granted the premises by way of mortgage in fee to Sir *Richard Borough, bart.*, who, by deed dated 8th November, 1830, assigned the mortgage and estate to *Eleanor Frewen*; she, by indenture of 13th December, 1838, assigned the mortgage and estate to *Thomas Frewen*, the lessor of the plaintiff, who had given a Mr. *Matthews* authority to receive rents and evict certain persons for him. *Matthews*, proved receipt of

he rents of the premises, on behalf of the lessor of the plaintiff, from the defendant. The plaintiff also proved service, on the defendant, of a notice signed by *Matthews*, as agent for the lessor of the plaintiff, to quit on the 25th March, 1840. The use of the defendant was, that there was no sufficient evidence of the authority of *Matthews* to serve the notice to quit; and that the defendant's tenancy commenced on the 29th September, not on the 25th March; and he produced and proved a lease from *Edward Hale Adderley*, dated 29th September, 1835, on the face of which were several alterations and erasures, and one in particular relating to the time of commencement of the tenancy. A suit had been instituted in Chancery, relative to the lands in question, pending which suit the lease had been executed by Mr. *Adderley*, and a Mr. *Cronin* had been appointed receiver in that cause. The lessor of the plaintiff produced Mr. *Cronin*, who proved that, in a conversation with the defendant, the defendant told him that his tenancy was to commence from 25th March, 1836; and also produced a witness named *Hayes*, who stated that he had served a notice on the defendant, to quit on the 29th September, 1839; on which occasion the defendant told him that "it was of no use to give him that notice, as his tenancy commenced on the 25th March, and that the notice should be for that day," or words to that effect. The judge sent the case to the jury, telling them that if a tenant misled his landlord, as to the commencement of his tenancy, he ought not to be allowed to set up a different case afterwards; adding, that the statement of the defendant, upon which the landlord acted, was at variance with the lease which he produced, and which, if not improperly altered, would be evidence as to the commencement of the tenancy; and left it to the jury to say, whether any alteration had been made in the lease

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after its execution. The jury found a verdict for the defendant, with which the judge was not satisfied.

Bennett, Q. C., with whom were *Collins*, Q. C., and *E. Corbet*, had obtained a conditional order on a former day to set aside this verdict, which he now moved to make absolute; and he cited *Watson v. Wace*(a); *Price v. Harwood*(b); *Lipscombe v. Holmes*(c); *Doe v. Lambly*(d). The evidence of authority to determine the tenancy is proved; 1st, by the receipt of the rents by *Matthews*: 2ndly, by his having authority to proceed in ejectment to recover other premises. [BRADY, C. B.—That shows that a special authority was requisite to do so; and that he had no authority to evict the defendant]. A written authority to receive rents is consistent with parol authority to determine tenancy, *Lord Sligo v. Davitt*(e). An authority to determine tenancy need not be in writing, *Latouche v. Latimer*(f); *Lessee Connor v. Mee*(g). [BRADY, C. B.—That was before *Doe v. Walters*]. *Doe v. Walters*(h) merely decides that it is a question for the jury, whether the party had authority at the time of service of the notice to quit. An agent to receive rents and to let, has authority to determine a tenancy, *Doe v. Mizem*(i). It is not necessary to prove at the trial the authority of an agent who has given notice to quit, *Doe v. Pen*(k). The tenant was estopped from relying on a different commencement of the tenancy, as it was upon his mis-statement the landlord had acted. It is immaterial whether the mis-statement was made by fraud or

(a) 5 B. & C. 155.

(c) 2 Camp. 441.

(e) 3 Ir. Law Rep. 146.

(g) Batty, 44, note.

(i) 2 Moo. & Rob. 56.

(b) 3 Camp. 108.

(d) 2 Esp. 635.

(f) Ib. referred to but not reported.

(h) 10 B. & C. 626.

(k) 3 L. R. O. S. 63.

'mistake; *Doe v. Lambly* illustrates that position. The case was made by *Adderley* the mortgagor, and as it conveyed no interest there could be no estoppel by it. The ancient rules, relating to estoppel, tended to restrict the doctrine to estoppel by deed; but the modern decisions have tended to extend the doctrine of estoppels to the conduct of the parties, *Peck v. Sayers*(a); *Grigg v. Wells*(b).

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Henn, Q. C., and *T. Fitzgerald*, contra.

BRADY, C. B.—This case comes before the Court upon motion to set aside the verdict had for the defendant, in ejectment founded on a notice to quit. As far as we can collect from the report of the judge, he was dissatisfied with the verdict. I think, when we look to the whole of the conduct of the tenant here, that it was not competent for him to turn round and say that his tenancy commenced at a different time of the year from that at which he himself had previously stated. A notice to quit was served, and we will assume that it was regularly served, and the tenant then stated that his tenancy commenced on the 20th of March. Had the case rested on the statement of the defendant, I could have felt that it ought to go to a new trial; but there is another part of the case; and the defendant is as much entitled to rely on it as if the verdict had been against him, and he was moving to set it aside; and on that ground I cannot understand why the case should again be sent down. The question turns up on the service of the notice to quit, served by *Matthews*. In that notice he represents himself to be agent of the lessor of the plaintiff,

(a) 6 Ad. & Ell. 475.

(b) 2 Per. & Dav. 296.

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that is a plain declaration that he was acting under a warrant of attorney. I will not, though I might perhaps do so, go so far as to say that a power of attorney was necessary; but independently of that, I think there is not evidence of sufficient authority in Mr. *Matthews* to determine this tenancy. His authority was to receive rents, and to evict certain other persons. That implies that he would require a particular authority to determine tenancies; I do not know that a mere receiver of rents has such a power. It has been said that the subsequent bringing of the ejectment was a sufficient recognition of his authority; but that principle has been encountered by a solemn decision of the *Queen's Bench* in *England*, that the subsequent recognition must be by something independent of the ejectment: that decision has not been impugned, but is recognized, by the Court of Common Pleas, in *Doe v. Robson*(a). In this case there is confessedly no recognition of this authority, except the simple fact of the bringing of the ejectment. On this ground I am of opinion the verdict should not be disturbed, as, if it were the other way, the defendant would have a right to have it set aside.

RICHARDS, B.—I think it right to say that I willingly and entirely concur in the principle of the class of cases cited by Mr. *Collins*, as to the information given by the tenant. Some rule must be acted on in the Courts of law and equity, and I think that when a tenant tells a landlord, on being served with notice to quit, that his tenancy commenced at such or such a time, he should not be allowed to show that it commenced at another time. It may, however,

(a) 4 Scott, 496.

re, that the question was more a matter of fact ; the agent had the lease, and this statement was rather his opinion as a matter of act. I am very much struck with the peculiar high Mr. *Matthews* describes himself and his the notice to quit. Does he not mean to say ; particular case he was acting under the orney, which, I am strongly inclined to say, l to produce, though it is not necessary now case upon that ground ? It is said that the ecognition on the part of the landlord will be lence of the agent's authority. As to that, I es have gone far enough. It is hard enough f a notice to quit be served by a person having a subsequent recognition is sufficient to give

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It might as well be argued that a notice by nnected with the tenant would be sufficient. erstand how the cases have gone so far. As o go, I am disposed to abide by the decision of rs, and that case decides, at all events, that ing of an ejectment is not of itself a sufficient of the agent's authority. I fully concur in of Justice *Parke* ; it is the expression of a lgment. This case expressly over-rules, (and on rightly,) the authority of the *nisi prius bell, Roe v. Pierce(a)*. Under these circum-think there is no evidence of the authority to serve this notice, but the subsequent the ejectment ; and, we think the verdict e disturbed.

Cause allowed without costs.

(a) 2_Camp. 96.

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EQUITY
EXCHEQUER.
Fri. May 28.

BUTLER and CORBET v. GOOLD.

On an application under 4 & 5 Will. IV. c. 82, the Court will not substitute service of a subpoena to answer upon a person who has been appointed receiver upon the defendant's lands, in a cause in Chancery, unless it can be sworn that he remits the rents to the defendant.

MR. CORBET applied on behalf of the plaintiffs to substitute service on the solicitor or land agent of the defendant, who was resident out of the jurisdiction of this Court. The application was made under the 4 Wm. IV. c. 82(a).

The affidavit of the plaintiffs' attorney stated, that the plaintiffs had filed their bill in this Court, on the 4th of April last, in order to obtain payment of a mortgage of certain lands claimed by the defendant *H. M. Goold*, who had been, for upwards of a year, residing on the premises, but in what place was unknown to the deponent, although diligent inquiry had been made to discover that *H. M. Goold* had been considerably involved in litigation in this country, and was defendant in two suits in the Court of Chancery, both instituted within the last six months, in which Messrs. *Symes* and *Kelleys* appeared for the defendant as his solicitor, and that he had otherwise acted for the defendant as his law agent in *Ireland*. That application had been made by the plaintiffs on the filing of the bill in this cause, to Messrs. *Symes*

(a) The first section of this act enables the Courts of Chancery in *England* and *Ireland*, to order that service of a subpoena to appear and answer upon the party in manner thereby directed, in any case where the said Courts respectively shall deem fit, upon the receiver, or other person receiving or remitting the rent of the lands or premises, if any, in the suit mentioned, returnable at such time and place as the said Court shall direct, shall be deemed good service of such

Keller to appear for the defendant *Goold*, which they had refused to do.

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The affidavit also stated that Mr. *R. Guinness* had been appointed receiver in the cases of *Richards v. Goold* in Chancery, and was in receipt of the rents of the whole or a great part of the property mentioned in the plaintiff's mortgage; that Mr. *Symes* was solicitor for the defendant in the last mentioned cause; and that Mr. *Guinness*, in the firm of Messrs. *R. S. Guinness* and Co., was otherwise the land agent of the defendant, the deponent having lately seen an advertisement, which was published in the *Dublin Evening Packet* of the 15th May, instant, respecting a sale of some lands of the defendant, in which reference was made to Messrs. *R. S. Guinness* and Co., land agents, *Kildare-street*, and Messrs. *Symes* and *Keller*, solicitors, *Dublin*. The deponent stated that he believed Mr. *R. S. Guinness* to be the land agent of the defendant. The present application was to allow substitution of service of the subpoena to answer and appear upon Messrs. *Guinness* and Messrs. *Symes* and *Keller*. *Callaghan v. Pepper*(a), and *Somers v. Connolly*(b), were cited in support of the application. [RICHARDS, B.—You swear that Mr. *Guinness* has been appointed receiver by the Court of Chancery; but the receiver in the Court of Chancery is in no species of priority with the owner of the estate. Do you swear that, independently of the Court of Chancery, Mr. *Guinness* is also the private agent of the defendant?] The advertisement states that *Guinness* is the land agent concerned for the defendant. But the objection made to *Guinness* does not apply to *Symes* and *Keller*.

(a) 2 Jones, 46.

(b) 1 Ir. Eq. Rep. 416.

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 v.
 GOULD.

BRADY, C. B.—There is nothing in the statute substituting service, on the law agent of the defendant, for service on the law agent of the plaintiff. It provides for serving the subpoenaed receiver, steward, or other person receiving the rents of the lands or premises, if any, in the action. The words of the statute are very plain. It is not stated here that *Guinness* remitted any part of the costs to the defendant. How could he do so, if he had a suit in Chancery over these lands of the defendant?

RICHARDS, B.—Some person must be a land agent of the defendant, with respect to which your charge is founded, or remitting them. You must make further inquiry about the defendant. He can swear that he keeps out of the way to a great extent, and we will then consider of it in that light; but evidence must be shown at present to justify the application.

Lessee SIR ROBERT GORE BOOTH v.
M'GOWAN.

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EXCHEQUER
OF PLEAS.
Tues. June 1.

EJECTMENT on the title, tried before Mr. Justice *Crampton* at the last summer assizes, for the county of *Sligo*, for certain lands of *Rathcloony*. A notice to quit was proved, signed by a Mr. *Dodwell*, the agent of the lessor of the plaintiff, and a power of attorney, on a £5 stamp, from the lessor of the plaintiff to Mr. *Dodwell* was produced, authorising him to collect rents and give receipts, to distrain, and generally to do all necessary acts towards recovering and compelling payment of the rents ; and more especially, appointing him to sign, in behalf of the lessor of the plaintiff, all notices to quit to be served on the tenants. The defendant's counsel called for a nonsuit, on the ground that no sufficient authority was proved for serving the notice to quit, the power of attorney being on an insufficient stamp, and alleged, that the instrument produced in evidence, containing a power to collect rents, required a £5 stamp, and for every other power contained in it, an additional stamp of 10s.^(a). Another question arose as to the commencement

A power of attorney to receive rents and to serve notices to quit, requires two separate stamps.

(^a) The schedule to the 56 Geo. III. c. 56, contains the following duties :—

	£	s.	d.
Letter or power of attorney, made by any petty officer, &c., for recovery of prize money,	0	10	0
Letter of attorney for the sale, transfer, acceptance, or release of dividends of any government, parliamentary, or other stocks or funds,	0	10	0
Letter or power of attorney of any other kind not otherwise charged,	0	10	0
Letter of attorney empowering any person to receive rents in <i>Ireland</i> , except letters of attorney to receive rents under custodiam or elegit.	5	0	0

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of the tenancy. The learned judge sent the case to the jury (who found for the plaintiff), reserving the nonsuit point for the consideration of the Court above. A conditional rule had been obtained for setting aside the verdict, and for entering a nonsuit or verdict for the defendant.

Casserley, for the defendant, insisted that the power of attorney should have a 10*s.* stamp. [RICHARDS, B.—It turns upon the question, whether a power to serve notices to quit, is incidental to a power to receive rent? I should say not].

West, Q. C., and *J. H. Blake*, Q. C., for the plaintiff.

Cur. adv. vult.

BRADY, C. B.—The Court having directed their officer to inquire at the stamp office, the officer has reported that he has been informed there, that the stamp office requires £5 stamp on the power to receive rents, and a 10*s.* stamp on the other power of attorney. Such having been the practice for a great number of years, we think there is nothing to prevent our putting the construction on the act, that there was not a sufficient stamp on this power of attorney. We, therefore, are of opinion that there should be a new trial.

Rule absolute for a new trial.

WILSON v. MITCHELL.

1841.

EXCHEQUER
OF PLEAS.

Tues. June 1.

Where a declaration in *indeb.**assumpsit* alleged the de-

fendant to be

indebted to the

plaintiff in

£20, for use

and occupa-

tion of an

apartment,

and (without

laying any pro-

mise to pay

it) proceed-

ed to state

him to be in-

debted to the

plaintiff in se-

veral other

sums for goods

sold, &c. con-

cluding with

an averment,

that the defen-

dant had pro-

mised in con-

sideration, &c.

to pay "the

*said last-men-**tioned* several

monies re-

spectively on

request," but

had not paid

"the said mo-

nies or any part

thereof," to the

damage, &c.

Held, bad on

demurrer for

want of pro-

mise in the

first count,

which was not

referred to by

the words "last

mentioned" in

the second

count.

ASSUMPSIT for use and occupation of an apartment. The declaration stated in the first count, that the defendant heretofore, &c., was indebted to the plaintiff in the sum of £20, for the use and occupation of certain apartments of the plaintiff, in and parcel of a certain dwelling-house and premises by the defendant, and at his special instance and request, "and by the sufferance and permission of the plaintiff for a long space of time before then elapsed, "had held, used, occupied, possessed, and enjoyed, together with certain furniture and other necessities of the plaintiff therein being;" without adding, that being so indebted the defendant promised to pay. The declaration then proceeded: "And whereas, also, the defendant, to wit, &c., was indebted to the plaintiff in £20, for goods sold and delivered," &c., and so on through the usual money counts, but alleged no promise to pay in any of them; and concluded thus, "and therefore the defendant, on the day and year last aforesaid, at the place last aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay him the said *last mentioned* several monies respectively, on request, yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, to the plaintiff's damage of £20, and thereupon he prays relief, and so forth."

To the first count of this declaration the defendant demurred specially, assigning, as causes of demurrer, that it was not alleged that the defendant promised to pay the

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money mentioned in that count ; and that it did not from the said count what damage the plaintiff had sustained and also for that there was no breach of promise as to the said first count of the said declaration ; and as the said first count of said declaration was in other uncertain, informal, and insufficient, and so forth, as the rest of the said declaration the defendant pleads *assumpsit*. Joinder in demurrer.

Macdonough in support of the demurrer.—There counts, even admitting that the money counts, taken together, are to be considered but as one count ; and no count to pay is alleged in the first. The words “ last mentioned monies ” can only apply to the monies mentioned in the first count, *Harding v. Hibel*(a).

Molyneux, contra.—The case cited is indeed in error but it has been substantially over-ruled. The “ last mentioned ” may be rejected, as was decided in *Barnes v. Keily*(b), for the whole declaration is in one count. In *Chevers v. Parkington*(c), where the defendant declared on a bill of exchange declared *in assumpsit* against the maker and the declaration contained a count, stating the maker’s indorsement and default of payment of the bill, and on an account stated, with one promise to pay the “ last mentioned several monies on request,” the defendant demurred specially on the ground of no promise being laid in the first count on the bill ; but the Court set aside the demurrer as frivolous ; and in *Mills v. Bamfield*(d), the Court of Bench here decided that they would not look at the

(a) 4 Tyr. 314.

(c) 6 Dow. Pr. C. 75.

(b) 1 Cr. & Dix. 358.

(d) 1 Jebb & S. 647.

"last mentioned," except to give the declaration the effect which the rules required, that is, to exclude duplicate promises.

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COURT.—We are of opinion the demurrer must be allowed, and that without interfering with any of the authorities. We must follow the authority of the case cited from *Tyrwhitt*, which is precisely similar to the present. When we come to examine the cases cited, so far from over-ruling that case, they seem to confirm it. In *Barnes v. Keily*, there was no separation of the counts, and the whole declaration was, in fact, but one count; and again in *Mills v. Bamfield*, the Court held that the words might be sensibly construed by being applied to all the counts, except the first; therefore that case does not appear to contradict *Harding v. Hibel*. *Boyce v. Williams*(a) also adopts the authority of *Harding v. Hibel*, and we think the present case must be ruled by it.

Demurrer allowed, the plaintiff to be at liberty to amend his declaration.

(a) 2 Jones, 214.

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EXCHEQUER
OF PLEAS.

Thur. June 10.

Where in an affidavit to change the venue, it was stated that the cause of action did not arise in the County of D., or elsewhere, in Ireland, out of the County of G., and it appeared that the cause of action was a contract for the sale of goods in Sheffield made in Ireland, with the travelling agent of the defendant; the Court refused to change the venue.

REEVES v. KILBEE.

MACDONOUGH, for the defendant, moved to change the venue in this action, from the county of the city of *Dublin* to the county of the city of *Galway*, and that the plaintiff should give security for costs. The affidavit stated that the cause of action did not arise in the county of *Dublin*, or elsewhere in Ireland, out of the county of *Galway*. To this an answering affidavit was filed, stating that the goods in question had been ordered by the defendant, in *Galway*, from a travelling agent of the plaintiff, who resided in *England*, and had been sent from *Sheffield* to the defendant. The declaration was filed the 3rd of May last, and the rule for judgment expired the 2nd of June; on that day the defendant's attorney gave notice to the plaintiff's attorney of this application, but the latter replied that he would proceed to mark judgment if a plea was not filed; a plea was, therefore, afterwards filed on the same day. It is contended for the plaintiff, that the case comes within that of *Crostwaite v. Shiel*(a). In that case it was sworn that the goods were to be sent from a place out of Ireland; here the plaintiff's traveller being in *Galway*, when the order for the goods was given, the contract was made there. As to the second branch of this application, it is not denied that the plaintiff resides out of the jurisdiction. [BRADY, C. B.—The only question is, whether you are in time]. In *Fletcher v. New*(b), the construction of the rule came before the court; the rule in *England* is

(a) 1 Hud. & B. 122.

(b) 3 Ad. & El. 531.

totidem verbis the same as in *Ireland*. [PENNEFATHER, B.—We have no such practice here as giving a copy of the plea; and they admit, in that case, that after issue joined it is too late to make such an application as this. Here we consider issue to be joined as soon as the plea is filed.] We had given notice to apply for security for costs before the plea was filed, and our notice of motion was dated the 2nd of June. [PENNEFATHER, B.—If judgment had been marked, pending the motion, that judgment would have been set aside; and I do not see why you should be now in a different position]. On the authority of *Fletcher v. New*, we are entitled to succeed in this motion; *Edinburgh and Leith Co. v. Dawson*(a).

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REEVES
v.
KILBRE.

J. D. Fitzgerald, contra.—The rule to change the venue must be refused. This is not the ordinary affidavit; for it states that “the cause of action did not arise in the County of Dublin, or elsewhere in *Ireland*, out of the County of Galway(b),” *Roxburghe v. Grimshaw*(c). [PENNEFATHER, B.—That is an answer to their application to change the venue]. Then as to the second point; if the motion be not moveable within the time to plead it is too late. [PENNEFATHER, B.—If the notice be given within the time that is sufficient.]

Court.—We think the second part of this application must be granted; but the first part must be refused with costs.

(a) 7 Dow. Pr. C. 573.

(b) The usual form of affidavit to change the venue is as follows:—

“A. B. of &c., in &c., the defendant in this cause, aged years and upwards, maketh oath and saith, that the plaintiff’s cause of action, if any, in this cause, arose in the County of C. and not in the County of D., or elsewhere, out of the said County of C. Sworn &c.” See 2 Stewart’s Law Forms, 954.

(c) 2 Jones, 35.

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EXCHEQUER
OF PLEAS.

Thur. June 10.

In assumpsit for work and labour, the defendant pleaded non-assumpsit as to part, and a tender as to part; judgment was marked on the whole record for want of a replication.

Held, that it was wrongly entered, and should have been only for the amount of the sum tendered.

CUMMINS v. CREAGH.

ASSUMPSIT for work and Labour: Pleas, *non assumpsit* as to part, and a tender of £13 8s. 10d. The defendant having served the usual rule, marked judgment on the whole record for want of a replication.

B. Keller, for the plaintiff, moved to make absolute a conditional order to set aside the judgment obtained by the defendant in this case. In November, 1833, the plaintiff had been employed by the defendant to slate a house, which was finished in 1836, and for this work the action was brought. Judgment was marked, on the 16th November, 1840, on the whole record for want of a replication. We consider that the judgment was wrongly entered; and we have offered to pay the costs, and plead issuably, in time to go to trial next assizes. The plaintiff swears there is a balance due to him. In the first place the defendant disputes that any sum was due, and then alleges that this application is too late, we having passed over Easter term. We served a consent for this motion in Easter term, though we did not obtain our conditional order until last term.

Freeman, contra.—It is sworn by the defendant that it was agreed, between him and the plaintiff, that the work, when completed, should be measured; this was done by a person named *Taylor*, who found that a sum of £13 8s. 10d. was due to the plaintiff. When this declaration was filed, the defendant lodged £13 8s. 10d. in Court. We did not mark judgment until three days after we were entitled.

at off our costs against the £13 8s. 10d., and paid the
 ce to the plaintiff's attorney. [PENNEFATHER, B.—
 did you get judgment on the whole record? What
 u do with the plea of *non assumpsit*?] There never was
 bjection made before on that ground; it now comes
 by surprise. The money was taken out of court by
 nt. We will not oppose the order if the plaintiff
 security for costs.

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ler.—It would be a great hardship on this person to
 ecurity for costs. [BRADY, C, B.—I do not see how
 defendant can seek security for costs where he has made
 wrong judgment].

URT.—We must set aside this judgment as entered—
 bound to do so; but as the plaintiff by his consent
 mitted the tender, we shall direct that the plea of
 be taken as confessed, and let the defendant be at
 r to mark judgment on so much of the plea as relates
 sum tendered, and let the parties be at liberty to
 d on the rest of the plea as they may be advised.

No costs of this motion.

ORDERED :—That the judgment, for want
 of a replication in this cause be set aside,
 and that the defendant be at liberty to
 mark judgment upon so much of his plea
 as states a tender, and the plaintiff be at
 liberty to proceed, as he may be advised,
 on the plea of non-assumpsit; and in the
 event of the plaintiff succeeding in any trial

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to be had on such plea of non-assumpsit, the defendant to be answerable for so much of the costs of the action as he may have received beyond the costs under such plea of tender. The plaintiff to proceed to trial at next *Cork* assizes. No costs of this motion.

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EXCHEQUER
OF PLEAS.

Fri. June 11.

An interest acquired after the service of an ejectment does not entitle a party to take defence.

DOE d. M'KIERNAN v. SHENKIN

EJECTMENT.—*Wynne* applied on behalf of a person who had acquired an interest in the premises since the service of the ejectment, that he might be at liberty to take defence.

PENNEFATHER, B.—We never grant that an interest acquired since the service of the ejectment entitles a party to take defence.

Refused.

DOCKRELL, Petitioner, v. DOLAN, Respondent.

1841.

EQUITY
EXCHEQUER.
Wed. Feb. 10.

indenture of lease, dated 7th April, 1826, *Terence A. being tenant of lands*
 demised to the petitioner, *Thomas Dockrell*, certain under the see
 ses at *Mountpleasant*, in the county of *Dublin*, for a of D., by lease
 of nineteen years, (with a covenant for renewal thereof, of 7th April,
 1826, demised
Dockrell, his executors, &c., so often as *Dolan*, his to B., his exe-
 cutors, &c., should obtain a renewal of the same pre- cutors, &c.,
 from the Rev. *Richard Graves*;) at the yearly rent of certain pre-
 15s.; and also as a fine for every renewal, a propor- mises for a
 tionable part of such sum as *Dolan*, his executors, adminis- term of twen-
 s, or assigns, should have *bond fide* paid for obtaining ty-one years,
 renewal: saving out of the whole of the said premises with a *toties*
 parts of them as were then in the possession of the *quoties* cove-
 said Canal Company, or to which they were entitled by nant for re-
 warrant to them theretofore made thereof by *Robert*, late newal, and
 bishop of *Dublin*. This lease contained, besides the with a cove-
 nant, and the ordinary covenants between lessor and nant on the
 , a covenant, as usual in town leases, restraining the part of B.,
 , his executors, administrators, or assigns, from carry- against carry-
 ing certain trades, and from doing certain offensive acts ing on certain
 as specified, under a penal rent of £5 a week. By trades, &c., on
 the lease of the 30th January, 1827, *Terence Dolan A. having pur-
 demised to the petitioner, Dockrell*, another piece of ground chased the fee
 in the lands
 under the
 church tem-
 poralities acts,
 B. offered to
 pay his pro-
 portion of the
 purchase
 money, and
 required a con-
 veyance of the
 perpetuity.
Held, that
 B. was not
 entitled to
 have a convey-
 ance of the
 perpetuity dis-
 charged from
 the prohibitory
 clauses con-
 tained in his
 lease.

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lease. The interest of *Terence Dolan* having become vested in the respondent, *Terence Thomas Dolan*, the said *Terence Thomas Dolan*, by lease of the 26th of April, 1827, demised to the petitioner another piece of ground at *Mountpleasant*, at the yearly rent of £9, for a term of nineteen years; with the same reservations, exceptions, and covenants as in the former leases. Another similar lease of other premises, at the same place, was made by *Terence Thomas Dolan* to the petitioner, on the 29th January, 1828.

The respondent, *Dolan*, having purchased the fee simple of the premises, under the Church Temporalities Act, from his next lessor, the petitioner, *Dockrell*, offered to pay *Terence Thomas Dolan* the proportion of the purchase money so paid by him, which the premises demised by the foregoing four indentures were liable to contribute; and required a conveyance of a perpetual estate in the premises from *Terence Thomas Dolan*, under 6 & 7 Wm. IV. c. 94; and accordingly caused four draft deeds, of the conveyance of the fee in the said premises, to be furnished to *Terence Thomas Dolan* for his approval; but *Dolan* refused to execute them, until the savings and covenants against carrying on the offensive trades and business, and all the penal and other special covenants in the foregoing leases, should be inserted in such conveyances of the perpetuity. There were no such savings and exceptions in the conveyance to *T. T. Dolan*, from his immediate lessor. The petitioner filed his petition in this matter, praying that it might be referred to the chief or second remembrancer to approve of a deed to be executed by *T. T. Dolan*, conveying the premises in perpetuity to the petitioner, with only

such savings and exceptions, covenants against trade or business, special or penal covenants, if any, as were contained in the conveyance to *T. T. Dolan*, from his lessor ; and to ascertain the proportion in which the petitioner should contribute to the amount of the purchase money paid by *T. T. Dolan*, on obtaining the perpetuity, and the rent to be in future paid by the petitioner in respect of the said premises ; and that, on payment of such purchase money, the respondent should be decreed to execute four deeds of conveyance of the premises to the petitioner. An order of reference was made on the 6th February, 1840, and on the 29th January, the second remembrancer made his report. To this report the petitioner excepted, on the grounds, that in the deeds settled by the remembrancer, he had inserted the aforesaid savings and exceptions, covenants against trades, prohibitions and penal covenants. The petition now came on to be heard on the report, exceptions and merits.

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Mr. *T. B. C. Smith*, Q. C., for the respondent.—*Dolan* in acquiring the perpetuity, acquired an unqualified estate for twenty-one years, enlarged to a fee. The covenants inserted in the lease to *Dockrell*, were necessary for *Dolan's* security ; the contract entered into was a qualified and conditional contract, yet it is now alleged that *Dockrell* is entitled to a conveyance of the fee absolutely. [BRADY, C. B.—They may say these claims are repugnant to a fee.] The 7th section of the 6 & 7 Wm. IV. c. 99, provides that, although there be a conveyance of the fee which, under the statute of *Quia Emptores*, would put an end to tenure between the parties, still the relation of landlord and tenant is to exist. But if all the covenants incompatible

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with a fee simple, such as a covenant to repair, and a covenant to insure, were to be struck out of this lease, it would be to destroy all the covenants necessary for the security of the value of the premises. There is a penal rent reserved for breach of these covenants; now a rent previously reserved is not put an end to by the act, but it would be put an end to if the covenants were struck out. It cannot be contended that, looking to the reason of the thing, the legislature intended to give a lessee an estate beyond what he had in his original lease. In *Byrne v. Hugo(a)*, indeed, the sub-tenant called on the mesne landlord to convey the royalties to him, and was held entitled to have the same conveyance of them which his lessor had from the Bishop, but the question of royalties is quite beside the present case.

Mr. *Warren*, Q. C., and Mr. *Brooke*, Q. C., on the other side.—The argument used for the respondent is merely *ab inconvenienti*, and is quite beside the purpose. The statutes of Church Temporalities being in *pari materia*, must all be construed together; the first of these by which the perpetuity in church lands was made acquirable by the immediate tenant, was the 3 & 4 Wm. IV. c. 37; in the 129th section of which, it is directed how the rent is to be paid to the ecclesiastical, or other person entitled. Penal rents are excluded from that section; and penal rents are not to be included in the rents reserved on perpetuities. The next legislative provision was 4 & 5 Wm. IV. c. 90; the 31st section of which enacts, that if the immediate

(a) 1 Ir. Eq. Rep. 351.

tenant had no interest in obtaining the perpetuity, the sub-tenant might obtain it, he securing a rent-charge to all the intermediate tenants. According to the judgment of the Master of the Rolls in *Byrne v. Hugo*, the sub-tenant is entitled to have as unqualified a fee from his lessor as the mesne tenant has got from the superior lessor. The rent to be reserved on a conveyance of the perpetuity from the church, is to be ascertained by "the profit rent for the time being, payable" out of the lands: these emphatic words are used for the purpose of confining it to the profit rent, and excluding penal rent; the rent then to be reserved, on the perpetuity, must be the rent received for the time being. Then how can it be imagined that the church is to lose all these penal rents, and yet that they are to be reserved for the benefit of the intermediate tenant? The purchaser is to get a fee simple. The first principle of law is, that a fee is to be unqualified; and it would be hard to hold that a mere annuitant was to have the benefit of those prohibitory clauses in respect of a property held by another in fee; it would be intolerable that those clauses should subsist, when the relation of landlord and tenant has ceased between the parties. Nothing is reserved in the act in lieu of penal rents; when the fee is purchased the penal rent is gone and done away with. Suppose a tenant under a bishop, holding under a penal rent, very disparaging to the value of his lands; when a valuation is made for the purchase of the perpetuity, the value of his lease is proportionably reduced; he then must pay the difference between the value of the lease, incumbered with the restriction and the full value of the fee. So that since the new rent goes in lieu of the old rent, and the money in lieu of the fee, the tenant would have to

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pay for the restricted fee, the full value of the fee, if unrestricted.

Serjeant *Greene* and Mr. *Martley* on the other side.—It is a fallacy to say, because the rent to be reserved on a purchase of the perpetuity is to be calculated from the permanent, and not from the contingent, rent, that nevertheless if the original contract be violated, the penal rent should not be recoverable; there may be a fee with a condition annexed, *Shep. Touchst.* 119.

BRADY, C. B.—This case comes before us on exceptions to the remembrancer's report of a conveyance of the fee and inheritance of the premises demised to the petitioner, authorized by 6 & 7 Wm. IV. c. 4, called the Church Temporalities Act; which is a statute for giving to the sub-tenants of the lessees of ecclesiastical persons, the benefit of the provisions of the former statute, which gave to the immediate tenant of the see a right of purchasing the perpetuity in his holdings. The question is whether, on the conveyance of the fee to be made to the sub-tenant, all such provisions are to be retained, as were contained in the *toties quoties* lease; or whether the tenant can insist upon having the fee of other lands discharged from these restrictions. It does not appear to the Court that he is entitled to this unrestricted conveyance. The immediate tenant had purchased the fee simple, and the effect of the 149th section of the 3 & 4 Wm. IV. c. 37, was to give him a lease for ever. As the parties stood before this application was made, the tenant would have had an estate of as long duration as the fee, and would have had it bound by these conditions. Now it is said the former statute gives him

the power of converting that interest into a legal fee, and that this of itself shows it to be necessary to discharge him from the legal operation of the covenants. These covenants have not a reference to the right of enjoyment of that property, but they are covenants by the owner of a larger part of the premises, for the benefit of the tenant, and of all the other owners of that property; that being so, the subtenant entered into the contract, and we may assume that he had some allowance in respect of them made in his rent, or that the rent was regulated by these conditions. No doubt such covenants as are inconsistent with an estate in fee, are not to be inserted in this conveyance; but when the owner of an estate enters into such covenants as these are, for the general benefit of his neighbours, I see nothing to prevent their being inserted in the conveyance of the fee, into which his derivative interest is to be converted. Suppose these covenants had not been made with the landlord, but were made with the tenants of the adjoining houses; can it be contended that the covenantee should now be discharged from them? Now these are conditions made in fact with the tenants of adjoining premises; and can it be said that the tenant, if he had granted a right of way, or covenanted not to shut up windows, or not to carry on a particular trade, should be released from his engagement by this conveyance? It is impossible that it could be so, and I take it that there is no distinction between such a case and the present. Suppose the bishop had restricted the tenant of lands adjoining to his palace by similar covenants, could the tenant insist upon a conveyance of the fee discharged from such restrictions? Unless we were coerced by the most stringent words in the act, I, for one, would not incline to think so; and I con-

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sider that so far from being coerced to discharge the sub-tenant, we may, under this section, make such a conveyance as we may think fit. No doubt the words of the section imply that we are to exercise a just and sound discretion ; but I think we shall not exercise that discretion improperly, by ordering these covenants to be inserted in this conveyance. If the tenant had obtained a conveyance in fee, and that no such covenants were inserted therein by the landlord, I do not say but that the landlord might have gone to the Court of Chancery to restrain the tenant from breaches of them. I am, at all events, clearly of opinion, that this act does not compel us to discharge the tenant from those obligations, and I think, therefore, that these exceptions must be over-ruled.

PENNEFATHER, B.—I think the intention of the act 6 & 7 Will. IV. c. 99, was, that the sub-tenants should get a fee, corresponding in quality with the interest which he had before, and discharged of such covenants as may be considered applicable only to the estate of a tenant, but that all other covenants were to remain unaffected by the act. If the tenant held lands to a right of way, or had contracted that he should hold the lands without erecting a nuisance, he must take the perpetual interest, subject to these qualifications ; and I think he must be considered to have entered into a contract, not only with his landlord, but with the owners of the adjacent ground. I think the legislature never intended to controul the contracts of parties with regard to such rights as these. I think we have a right to direct that a conveyance should be made pursuant to the real contract of the parties ; and we think the sub-tenant entitled to the fee, discharged of all such con-

tracts as are incompatible with such an estate, but subject to such conditions as existed between that lessor and the other parties, who have a right to enforce the performance of these conditions, and that these exceptions should be over-ruled. And, as the law agrees with the justice of the case, I think the petitioner ought to pay the costs of his experiment on the present occasion.

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RICHARDS, B., concurred.

FOSTER, B., was absent.

Exceptions over-ruled, with costs.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER

IN IRELAND,

IN MICHAELMAS TERM, IN THE FIFTH YEAR OF THE REIGN
OF QUEEN VICTORIA, AND THE SITTINGS AFTER.

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EXCHEQUER
OF PLEAS.
Jan. 20.

FERRERS v. COSTELLO and Wife.

A. and his wife I., who had property settled to her separate use, made their promissory note, and A. having died before payment of the note, I., his widow, being called on for payment, said, "it is a just debt, and I will pay it as soon as I am able." I. afterwards married the defendant. The fact of separate property did not appear upon the pleadings. *Held*, that there was no sufficient consideration in this promise appearing on the pleadings to support an action of assumpsit.

ASSUMSPIT on a promissory note by indorsee against maker. The first count of the declaration was as follows :—

"For, that whereas the defendant, *Isabella Costello*,
"heretofore, and while she was the wife of *Daniel Morgan*,
"now deceased, and the said *Daniel Morgan* heretofore,
"to wit, on the 4th day of November, in the year of our
"Lord 1833, in the county of the city of *Dublin*, made
"their promissory note in writing, and delivered the same

‘ to one *Robert Ferrar*, and thereby jointly and severally
‘ promised to pay the said *Robert Ferrar*, or order, the
‘ sum of £40, twelve months after the date thereof, which
‘ period has now elapsed. And the said *Robert Ferrar* then
‘ and there indorsed the said note to the said plaintiff,
‘ whereof the said *Isabella* and the said *Daniel* then and there
‘ had due notice ; and the said *Daniel* and *Isabella* then and
‘ there, jointly and severally, promised the said plaintiff
‘ to pay him the amount of the said promissory note, ac-
‘ cording to the tenor and effect thereof, and of the said
‘ indorsement. And the said plaintiff avers that after-
‘ wards, and before the promise of the said defendant
‘ *Isabella*, hereinafter next mentioned, the said *Daniel*
‘ *Morgan* died, without having paid the amount of the said
‘ promissory note, and leaving the said defendant *Isabella*
‘ him surviving. And that afterwards, and before the inter-
‘ marriage of the said *Isabella* with the said *Lawrence Costello*,
‘ to wit, on the first day of November, in the year 1839,
‘ the amount of the said note being and remaining wholly
‘ due and unpaid ; and the said defendant, *Isabella*, having
‘ full knowledge and notice of the premises, she, the said
‘ defendant *Isabella*, after the death of her said husband
‘ *Daniel*, as aforesaid, and whilst she was sole and a widow,
‘ in consideration of the premises, then and there promised
‘ the plaintiff to pay to him the amount of the said
‘ note, according to the tenor and effect of the same.”

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“ And whereas the defendant *Isabella*, afterwards, whilst
 she was sole and a widow as aforesaid, to wit, &c., at
Dublin, &c., was indebted to the plaintiff in £100 for so
 much money then and there paid by the said plaintiff for
 the use of the said *Isabella* whilst she was sole and unmar-

1841. “ ried : and in (here follow the usual money counts). And
 FERRERS “ the said defendant *Isabella* afterwards, to wit, on the day
 v. “ and year last aforesaid, at the place aforesaid, in the county
 COSTELLO. “ of the city aforesaid, she being then sole and a widow as
 “ aforesaid, in consideration of the said last-mentioned pre-
 “ mises respectively, promised the said plaintiff to pay to him
 “ the three last mentioned several sums of money respectively
 “ on request : yet the said defendant *Isabella*, whilst she was
 “ so sole and a widow, as aforesaid, and the said defendants,
 “ *Lawrence* and *Isabella*, since their marriage, have not nor has
 “ either of them as yet paid the said several sums of money
 “ or any of them, or any part thereof, to the damage, &c.”

The defendant pleaded the general issue.

It appeared on the trial that the note in question was made by *Isabella Costello* and her first husband, during coverture. After proving the making of the note, a witness for the plaintiff swore that after *Morgan's* death, an application for payment was made to the defendant *Isabella*; and that on that occasion she said, “ it is a fair debt, and I will pay it as soon as I am able.” The plaintiff then produced the will of a person named *Elizabeth Clarke*, to prove that the defendant, *Isabella*, had been thereby left some property for her separate use; and a trustee under that will swore that he had paid the rents of that property to her, *Isabella*. The defendant's counsel contended that the note executed during coverture was void as to *Isabella*, and that her promise, or what was given as evidence of it, was a mere *nudum pactum*, without legal consideration or moral obligation to support it; and, that being a nullity, the defendant *Lawrence* could not be liable to the payment. The learned Chief Baron directed the jury to find for the

plaintiff, reserving leave for the defendant to move to have the verdict changed into a verdict for the defendant, if the court should be of opinion accordingly.

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Holmes, with whom was *Fitzgibbon*, now moved accordingly. If any presumption exist, it is that *Isabella* executed the note under the coercion, or by the direction of her husband. A married woman cannot contract so as to become liable in a Court of law, *Lloyd v. Lee(a)*, *Cockshott v. Bennett(b)*, *Lewis v. Lee(c)*, *Marshall v. Rutton(d)*, *Faithorne v. Blaquiere(e)*, *Littlefield v. Shee(f)*. In this case there is not even a moral obligation. [BRADY, C. B.—There is a late case, *Eastwood v. Kenyon(g)* overruling these cases of moral obligation.] It does not appear that as in *Lee v. Muggeridge(h)*, the money was procured at her request. If she has done anything to affect her separate estate, they must have recourse to a Court of Equity; but even a Court of Equity would not make a decree against herself personally, 1 Mad. Ch. Pr. 599; *Francis v. Wigzell(i)*. The cases of *Atkins v. Hill(k)*, *Hawkes v. Sanders(l)*, have been overruled by *Deeks v. Strutt(m)*. That “she would pay it when in her power” is a mere conditional promise; but the promise to pay should be positive, whether there be a moral obligation to support it or not, *Fleming v. Hayes(n)*; *Mucklow v. St. George(o)*; *Linbury v. Wrightman(p)*.

(a) 1 Str. 94.

(c) 3 B. & C. 291.

(e) 6 M. & S. 73.

(g) 3 Per. & Dav. 276.

(i) 1 Mad. 258.

(l) Cowp. 289.

(n) 1 Stark, 370.

(p) 5 Esp. 198.

(b) 2 T. R. 765.

(d) 8 T. R. 545.

(f) 2 B. & Ad. 811.

(h) 5 Taunt. 36.

(k) Cowp. 288.

(m) 5 T. R. 690.

(o) 4 Taunt. 613.

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Whiteside and *Napier* for the plaintiff.—This motion must be refused: the proper course for the defendant was to move in arrest of judgment, if the facts stated on the declaration did not disclose a sufficient cause of action, *Lumley v. Allday*(a). The wife is bound to pay the amount of the note, she having joined with her husband in making it, and it being proved at the trial that she has separate property. She was under a moral obligation to pay it, which was a sufficient consideration to support her subsequent promise to do so. *Chitty* on Bills, 7th Ed. 18; B. N. P. 139; 1 Viner Ab. "Assumpsit," A; *Traner v. ———*(b), *Hawkes v. Sanders*(c), *Atkins v. Banwell*(d), *Suffield v. Bruce*(e). Even were the note originally void as to her, the subsequent promise to pay would bind her. So, where goods have been supplied to an infant, and, after he comes of age he promises to pay for them, this promise is supported by the previous consideration, *Cooper v. Martin*(f), *Southerton v. Whitlock*(g), *Thornton v. Illingworth*(h). Lord Mansfield has said, that even an obligation of honour is sufficient consideration to support a subsequent promise, *Gibbs v. Merrill*(i). A promise by a bankrupt after he has obtained his certificate will bind him in respect of his previous liability and the moral obligation to discharge it, *Trueman v. Fenton*(k); so, of a promise made after an usurious contract, *Barnes v. Hedley*(l). Though a Court of law cannot enforce equitable rights, yet it will look at them to enforce legal rights through

(a) 1 Cr. & Jer. 305.
 (c) Cowp. 289.
 (e) 2 Star. 175.
 (g) 1 Str. 690.
 (i) 3 Taunt. 311.
 (l) 3 Taunt. 184.

(b) 1 Sid. 57, pl. 25.
 (d) 2 East. 505.
 (f) 4 East. 76.
 (h) 2 B. & C. 824.
 (k) Cowp. 544.

their means, *Hunt v. Danvers*(a), *Thorpe v. Thorpe*(b), *Scott v. Stevens*(c); and this Court may recognize the fact that the defendant *Isabella's* separate property would be available in equity. [BRADY, C. B.—What consideration is expressed here in the declaration? As I understand it, it states merely the making of the note; and that in consideration of having made the note she promised to pay. There is no averment that the money was paid to her.] After a verdict has been had every thing must be intended to uphold it. The contract of a *feme covert* is not a nullity, if her husband be present and assenting to the transaction. *Com. Dig.* “Baron and Feme,” Q; *Manby v. Scott*(d), *Bowyer v. Peake*(e), and in Lord Northampton’s case(f), it is said by *Manwode*, J. that if a *feme covert* by duress joins in a lease with her husband, it shall bind her. Coverture is not the same sort of disability as infancy, for most of the acts of an infant are void, see *Hunter v. Agnew*(g); but coverture is merely a suspension of the wife’s liability, *Moore v. Hussey*(h), *Bill v. Hyde*(i), *Foley v. Keatinge*(j). This comes within the distinction taken in the note to *Wennall v. Adney*(k); but the reporters there make inaccurate distinctions between the liabilities of infants and married women. An express promise to pay, if there be any postponement of the time of payment, renders the party who makes it liable *de bonis propriis*, *Hart v. Minors*(l).

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This case was again argued by *Napier* for the plaintiff.— *Wed. Nov. 3.*

(a) Sir T. Ray, 370.

(c) 1 Sid. 89, pl. 7.

(e) Freem. Ch. Ca. 215.

(g) 1 Fox & S. 15.

(i) Gilb. Eq. Rep. 83.

(k) 3 B. & P. 347.

(b) 1 Ld. Ray, 662.

(d) Bridg. 231.

(f) 3 Leon. 72.

(h) Hob. 95.

(j) 2 Jones, 153.

(l) 2 Cr. & Mee, 700.

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If there was no separate property of the wife, I admit the note would be a nullity; the validity of the all of the making of the note depends upon the fact of being separate property or not; for, the only reason *feme covert* is disabled from suing is, that the law do contemplate her having any property of her own. PENNEFATHER, B.—It is stated in the declaration that promised in consideration of the premises. Not merely stating that a *feme covert* made a note joint with her husband, is no consideration for an express promise. The statement in this declaration does not go farth saying that she did the manual act of signing the note and does not imply a consideration.] In *Lee v. Muggeri* Sir *William Grant* dismissed the bill, because there was no power to the married woman to appoint during coverture but he sent the case to the Court of Common Pleas where the plaintiff recovered there upon the promise of the defendant made after her husband's decease, to pay a debt incurred by her during coverture. [BRADY, C. B.—In *Lee v. Muggeridge*, the declaration averred the defendant to have separate property. PENNEFATHER, B.—It is manifest that there did not consider the making of the note a sufficient consideration of consideration]. But in *Lloyd v. Lee*, it is laid down that a moral obligation is quite sufficient to support a subsequent promise. [PENNEFATHER, B.—But the obligation must be stated upon the pleadings: there is no averment as in *Lee v. Muggeridge*, that the money was lent by her procurement].

BRADY, C. B.—We are all of opinion that this declaration does not disclose sufficient facts to maintain

action. I shall say nothing of *Lee v. Muggeridge*, as it is not now necessary to investigate that decision. The Court have all agreed that the judgment must be arrested, for that is the proper course, consequently there can be no costs at either side. We would give no costs of this motion, as the party might have demurred, and terminated the case at less expense.

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Judgment arrested.

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TROVER.—The plaintiff was the assignee of one *Henry*, a bankrupt; the defendant, a creditor of the said *Henry*, by judgment on a warrant of attorney. The defendant had sued out a writ of execution on his judgment, directed to the sheriff of *Armagh*, commanding him to levy the amount therein mentioned of the goods and chattels of *Henry*. This writ was delivered by the defendant to the sheriff, who, on the 30th December, 1839, about seven o'clock in the evening, seized thereunder the goods and chattels, the subject of the present action, which, before and at the time of such seizure, were the goods of *Henry*. *Henry* was afterwards duly declared a bankrupt, and the plaintiff was appointed his assignee. At the trial of this case at the spring assizes for the county of *Armagh*, before Mr. Justice *Torrens*, it appeared in evidence, that about ten o'clock on the same evening on which the goods had been seized, the defendant committed an act of bankruptcy, by leaving his dwelling-house,

Trover lies by the assignee of a bankrupt against a creditor, by judgment on a warrant of attorney, to whom a sheriff has paid over the proceeds of a sale of goods of the plaintiff, seized prior to the act of bankruptcy, under a writ of execution on such judgment, and sold after the act of bankruptcy, without notice to the sheriff or execution creditor of such act of bankruptcy.
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for the purpose of avoiding his creditors. Two days afterwards the sheriff sold the goods so seized, and paid over the full amount of the sale to the execution creditor. It was not proved that either the sheriff or execution creditor had any notice of the act of bankruptcy, or that any notice had been given the former not to sell. The present action was brought by the assignee of *Henry*, to recover the value of the goods so sold. The defendant's counsel objected that the seizure, having been previous to the act of bankruptcy, was lawful, and that the plaintiff had no title to the goods to enable him to maintain the action of trover. The learned Judge overruled the objection, and sent the case to the jury, giving it as his opinion that the action was maintainable, but reserved the point for the consideration of the Court above. The jury found for the plaintiff. A conditional order had been obtained on a former day to set aside this verdict, which

Holmes, with whom were *Tomb* and *Sterne B., Miller*, now moved to make absolute. The security which the defendant here had for his debt was within the proviso in the latter part of the 126th section of the act(a); but we contend that trover is not the proper form of action in this case. If any action does lie, it is

(a) 6 Will. IV. c. 14. s. 126.—And be it enacted, that no creditor having security for his debt, or having made any attachment in *Dublin*, or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive, upon any such security or attachment, more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt, before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditor.

one for money had and received. Neither of the parties were trespassers at the time of the seizure: the execution was a lawful act at the time it was laid on, and no action of tort would lie against the sheriff; a relation of law can never make an act tortious which was originally lawful; *Butler and Baker's case*(a). There can be no substantial distinction between the sheriff and the defendant who has adopted his act. The effect of the 126th section is to give to the other creditors a rateable proportion with the execution creditor, not to render the execution void altogether; *Nottley v. Buck*(b), *Taylor v. Taylor*(c). In *Wymer v. Kemble*(d) the plaintiff was not a creditor having security for his debt; Lord Tenterden there says the seizure *and sale* were perfect before the act of bankruptcy. In *Higgins v. M'Adam*(e) it was held that a plaintiff in execution upon a judgment by confession, ceases to be a creditor having security for his debt, within the statute 6 Geo. IV., c. 16, sect. 108, when the goods seized under that execution are sold, even though an act of bankruptcy be committed before the return of the writ; and the Court there decided that the creditor was entitled to retain the proceeds of an execution sale of goods of the debtor, though the *fiery facias* was not returnable before the act of bankruptcy. The goods being in the possession of the sheriff, he had a right to sell them. In *Nottley v. Buck* it was doubted whether any action at all would lie in such a case, and the Court seemed to consider that at all events the sheriff would not be liable in trover. There is no case in

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(a) 3 Co. 29, b.

(c) 5 B. & C. 392.

(e) 9 V. 211

(b) 8 B. & C. 160.

(d) 6 B. & C. 479.

1841. *England* in which trover has been held to lie in such a case as this. The old law gave priority to the seizure; the new statute enacts that the judgment creditor by confession shall derive no benefit from his prior seizure under such circumstances; but it does not say that the judgment creditor seizing goods under such circumstances shall be a wrong-doer. This action could not have been brought against the sheriff. [RICHARDS, B.—The difficulty I have is, that this is an action against the execution creditor; I do not see how he can be liable in trover.] In *Woodland v. Fuller*(a) trover was brought against an execution creditor for goods seized by the sheriff's officer, by the order and direction of the defendant, under a writ lodged with the sheriff before a vesting order made by the Insolvent Court, and afterwards sold. It was there held that the goods were bound by the delivery of the writ to the sheriff's officer. In *Garland v. Carlisle*(b) the seizure and sale were both after the act of bankruptcy; so in *Balme v. Hutton*(c). In *Groves v. Cowham*(d), which was a case under the *English Insolvent Act*, 7 Geo. IV., c. 57, the creditor had been arrested before the seizure. There is no evidence here of a demand and refusal, so as to show the defendant had been guilty of a conversion. *Miller* also referred to Justice *Pattison's* judgment in *Giles v. Grover*(e) and Justice *Littledale's* judgment in the same case, p. 177.

Gilmore, Q.C., Whiteside and Napier, contra.—It would

(a) 11 Ad. & El. 859.

(b) 7 Bing. 298; 10 Bing. 452; 4 Bing. N. C. 7.

(c) 2 Cr. & Jer. 19.

(d) 10 Bing. 5.

(e) 1 Cl. & Finell, 77.

a great hardship on the other creditors if an action of money had and received were to be the only remedy in cases like the present, since it is well known that property never sells at sheriffs' sales for its full value. There would then be no check upon execution creditors trying to sell the debtor's property whenever they apprehended his insolvency, if no consequences were to open but the mere refunding of the produce of such sales, made at an undervalue. The execution creditor is, indeed, justifiable in delivering the execution to the sheriff, and the sheriff was justifiable in seizing under it; but from the time when the act of bankruptcy was committed, the property ceased to be that of the sheriff, and became that of the assignee. The two forms of action rest upon the same grounds, that is, that the property is in the assignee; *Kitchen v. Campbell*(a). But an action of money had and received, may be brought if the plaintiff chooses to waive the tort committed by the sale of his property. The turning the property into money was itself a conversion; a demand and refusal are only evidence of a conversion. The law fluctuated for a long while upon the question, whether a sheriff was liable in trover for seizing and selling the goods of a trader after an act of bankruptcy had been committed by him; but it is now settled that he is in all cases so liable. Why, then, should the execution creditor, who adopts his act, be free? Even where a seizure was originally lawful, the sheriff will be liable in trover for the conversion of goods which he had no right to retain; *Stead v. Macoigne*(b). The same principle is to be found in

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(a) 3 Wils. 307.

(b) 8 Taunt. 527.

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Groves v. Cowan(a), a case not different in principle from this, in which *C. J. Tindal* treats the original seizure as legal, but the sale as illegal. The act of bankruptcy is a statutory supersedeas to the execution. Notice to the sheriff of the act of bankruptcy is immaterial, *Garland v. Carlisle*(b); and if an action for money had and received would lie against the execution creditor, (as it is conceded that it would), the question of notice would be immaterial here also. Even in *Balme v. Hutton*, which was decided before *Garland v. Carlisle* was determined by the House of Lords, the Court of Exchequer admitted that the execution creditor would be liable, notwithstanding that he had no notice of the act of bankruptcy. All cases not within the proviso of the statute must be within the exception, *Wymer v. Kemble*(c); but this is a judgment on a warrant of attorney, and therefore within the proviso, as being a judgment by confession; *Baker v. Pettigrue*(d).

RICHARDS, B.—(After stating the facts of the case).—Unquestionably it has been established, though not without some opposition, but upon principles that appear to me perfectly intelligible, that when an act of bankruptcy has been committed before the issuing of the execution, the sheriff who seizes and sells the goods that did belong to the debtor before the bankruptcy, as well as the plaintiff in the execution who puts the sheriff in motion, and takes the benefit from such sale, are each of them liable to be sued in trover, by the assignee of the bankrupt, for the goods so seized. There are many cases, but I

(a) 3 Moo. & Sc. 352.

(b) 4 Bing. N. C. 7.

(c) 6 B. & C. 479.

(d) 2 Ir. Eq. Rep. 151.

think it sufficient to refer to *Balme v. Hutton*(a). This law, however, it must be admitted, is a hard law, and sometimes presses severely, if not unjustly, upon the public officer and *bonâ fide* creditor. But as long as the sheriff is bound by law to seize and sell the goods of the defendant in the execution, and none other, (and I do not see how the law could be otherwise than it is in that respect,) so long, I apprehend, must the responsibility of the sheriff and execution creditor continue to the extent that I have stated. The necessity of the case, and undoubted principles of law, require that it should.

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But in the present case it is insisted that a still more severe and stringent rule of law should be meted out to the sheriff and to the execution creditor. It is said and argued, although no act of bankruptcy had been committed by the debtor at any time previous to the issuing of the execution against him, or prior to the seizure of his goods by the sheriff, that nevertheless, and although the goods which the sheriff seized were in fact and in law the goods of the defendant at the time of the seizure, and although it is not alleged, or shown in any way, that the sheriff or execution creditor had any notice of any act of bankruptcy committed by the debtor subsequently to the seizure under the execution, that nevertheless the sheriff and the execution creditor, in the absence of any demand on them, or claim by any other party, are guilty of a tort in selling the debtor's goods, and of a wilful conversion of those goods, which is admitted have been rightfully seized, upon the

(a) 9 Bing. 471.

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ground that the debtor had committed a secret act of bankruptcy after the seizure, of which they (the sheriff and execution creditor) knew nothing. The question is not whether the proceeds of the sale should not be paid over to the assignee, to be distributed rateably amongst the creditors of the bankrupt; for that, I apprehend, is not disputed, and, in my opinion, may be come at in another way; but, whether the execution creditor, who rightfully sued out his writ of *fi. fa.*, and rightfully delivered the same to the sheriff, by whom the goods were legally and rightfully seized, is, as well in this case as where the act of bankruptcy has been committed before the execution delivered, to be made a tort-feasor by relation; and that upon the ground, that he has not taken notice of a secret act of bankruptcy, of which he had no knowledge, and because he has omitted to be active in withdrawing his execution from the sheriff upon the commission of such secret act of bankruptcy; and this brings me to the act of parliament upon which the question in this case turns, 6 Wm. IV., c. 14, sect. 126. (Reads the section.)

Now, I must say, that, in my opinion, these words in the proviso may be well satisfied without giving them the harsh and, I would say, unjust construction contended for. The proviso in this section does not say that the execution is to be void and of none effect from the commission of an act of bankruptcy after the delivery to the sheriff, nor declare that no sale shall take place under it, or that the duty of the sheriff to sell under it shall cease, or any thing tantamount to that, at least, in my opinion. Now, in the Insolvent Debtor's Act, in *England*, 7 Geo. IV., c. 51, sect. 34, the language is much more

express and emphatic, though there the fact that was to render the creditor incapable of availing himself of his execution was one of a public nature, viz., the arrest and confinement in gaol of the debtor; and such as any execution creditor or sheriff might be reasonably supposed to know, or to have the means of becoming acquainted with. The words of that act, sect. 34, are these:—"In all cases where any prisoner, who shall petition the said Court for relief under this act, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued, or to be issued, upon any judgment obtained, or to be obtained, upon such warrant of attorney, or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or of any part thereof, or by sale of such property theretofore seized, or any part thereof; but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and may be a creditor or creditors for the same under this act"(a). And, no doubt, it has been held, upon that statute, that the arrest and imprisonment of the debtor, after seizure and before sale, followed up by his subsequent discharge under the Insolvent Act, entitle the assignee to proceed in trover against the execution creditor, *Groves v. Cowham*, and the cases there referred to. And I

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(a) This section is re-enacted by 1 & 2 Vic. c. 110, s. 61. The *Irish Insolvent Act*, 3 & 4 Vic. c. 107, s. 48, contains a similar provision.

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am free to admit that these cases touch the present question very nearly, and certainly have pressed me much; however, they do not appear, upon the best consideration I can give them, to govern the present case. The language of the act of parliament, upon which these decisions turned, appears to me to be different in some essential particulars from the statute upon which the present question is to be decided, as I think I have shown. And in the case of *Groves v. Cowham*, the fact that notice of the insolvency of the debtor, and a caution against selling under the execution were given, was relied on by the Court, in pronouncing judgment, as an important and material circumstance in the case; though, no doubt, in another case, an action of trover appears to have been held by the Court of Common Pleas, to be maintainable in a case that came before that Court on a question of pleading, and in which no averment of notice of insolvency to the execution creditor appears to have been made in the pleadings: I allude to the case of *Keley v. Minter(a)*. In that case the action, which was trover, was brought by the assignee of the insolvent against the execution creditor; I find, however, Chief Justice *Tindal*, in giving judgment and speaking of *Nottley v. Buck*, upon which I shall presently remark, says, "there was an express averment in the replication that the sheriff had notice of the act of bankruptcy before he proceeded to a sale; he was, therefore, clearly a wrong doer." Now, if it be necessary, to make the sheriff "clearly a wrong doer," that he shall have notice of the bankruptcy or insolvency when the same occurs subsequently to the issuing of the execution, I confess

(a) 1 Scott, 620.

cess to understand why the execution creditor,
 is anterior to any thing the sheriff does, and
 likely to know any thing about the subsequent
 t of his debtor, should not be entitled to a
 or demand of the goods before he can be
 ig doer; and I find no case, unless *Kelcy v.*
 one, that takes a distinction between the
 editor and sheriff upon the section of the
 under consideration, or upon any analogous

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us discussed the class of cases that are founded
 .vent Debtors' Act and Bankrupt Act, where
 bankruptcy occurs previous to the issuing of
 n and the seizure of the goods of the debtor,
 er cases cited which I think it necessary to
 first, *Wymer v. Kemble*: that was an action
 / the execution creditor against the assignee
 r, in which the execution creditor recovered.
 take it, merely decides, that a creditor who
 ecution, under which the debtor's goods are
 him by the sheriff, on a bill of sale, is not
 , having security for his debt" according to the
 n of the 6th Geo. IV. c. 16; and no doubt
 e having been paid. But it is, relied upon,
Bayley there states that the proviso in the
 ection of that *English* statute, "fastens upon
 ie exception," and to the extent of preventing
 or execution creditor from withholding from
 of the bankrupt the proceeds of the sale.
 does limit the exception; but it is another
 er without any kind of previous notice of such

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act of bankruptcy, or demand of the goods, it operates not merely to discharge the sheriff from the performance of his duty under the execution, but divests and takes out of him *eo instanti* the special property which he has in the goods. Baron *Bayley*, however, when discussing the same case with counsel, in the course of the argument says, “Your argument goes to the extent that the assignee may, at any period, even after the lapse of 10 years, “recover money levied under a judgment by confession;” to which proposition the learned Baron does not certainly appear himself to assent.

The next case to which I would refer is *Moreland v. Dickens(a)*: that was an action of assumpsit brought by the assignees of a bankrupt against an execution creditor for money received by him from the sheriff, under an execution founded upon a warrant of attorney; but in truth it was in principle similar to *Wymer v. Kemble*; the Court holding that when the sheriff receives from the debtor the amount of the execution before an act of bankruptcy committed, the execution creditor is not a creditor having security for his debt at the time of the bankruptcy, and accordingly the execution creditor had judgment in that case also.

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Notley v. Buck, is the next case that I think it necessary to notice. That was an action for money had and received, brought against the sheriff, who, though he had seized before the bankruptcy, had, subsequently to the act

(a) 8 B. & C. 722.

of bankruptcy, sold the debtor's goods under execution, and paid over the proceeds to the execution creditor. In that case the Court declined expressing any opinion whether the sale by the sheriff was right or not, and merely held that the proceeds of the sale belonged to the assignee. Lord *Tenterden* expresses himself thus in that case, (8 B. & C. 164 and 165): "The intention that a creditor, under such circumstances, shall not have the full benefit of his execution, but only be paid *pari passu* with the other creditors is sufficiently manifest: the difficulty is as to the means of giving effect to this intention, no mode being mentioned in the act; and, upon consideration, it appears to us that the only effectual mode is to prevent the creditor from receiving the money produced by a sale of the goods taken in execution." And, again, he says—"The seizure being prior to the act of bankruptcy will be lawful and right: it is not necessary to say whether the sale be lawful or tortious; the sale may be a lawful one, and yet the proceeds may belong to the assignees, or, if it be wrongful, they may waive the wrong and sue for the proceeds as money received for their use." The case of *Giles v. Grover*, also cited by the plaintiff's counsel, decides that when goods have been seized under a *fi. fa.*, but remain unsold in the hands of the sheriff, he shall sell them under a writ of extent in chief, or in aid, tested after the seizure under the *fi. fu.*, but delivered to the sheriff before the sale; and shall satisfy the Crown's debt without regard to the previous execution; the House of Lords holding that in a case so circumstanced the execution could not be considered as completed by the seizure; and the same principle will be found, I apprehend, applicable to other cases, and cannot now be questioned. But,

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I am not aware, that any of the principles to be deduced from that case need be impugned in deciding the present; that case in no way conflicts with the position that the sheriff, who seized goods under an execution, has a special property in such goods, liable to be divested, no doubt: but having rightfully seized them, as in this case, and having such special property in them by virtue of such seizure, the difficulty is to understand how he or the plaintiff in the execution, can be said to have *wilfully converted* such goods, because the debtor may subsequently have committed some secret act of bankruptcy. I apprehend that in many cases the right of property will not alone be sufficient to entitle a party to sustain trover against a person in possession. In *Jones v. Frost*(a), it was held, that a demand was necessary to maintain trover, though the property in that case (certain bills of exchange) clearly belonged to the assignees in point of law. It is, as I take it, a mistake, and quite against the authorities to suppose that a general property in goods will, in every case, without more, entitle a party to bring trover. To make a party guilty of a tort, in a case circumstanced as the present, when the seizure was originally lawful, I take it, that a wilful conversion should be shown, and that for such a purpose it would be necessary to show a demand and refusal of the goods, or, at least, clear notice of the plaintiff's rights; and that such demand should be made, or notice shown, at a period when the defendant had it in his power to deliver or refuse such goods; not a demand after a sale had without notice of a title acquired by relation by the assignees, as in the present case. And now, having looked as carefully as I could through all the

(a) 9 B. & C. 764.

cases that have been cited, I do not apprehend that any of them decide the very point that we have at present before us; and being strongly impressed with the mischief that would arise from the construction of this act, con-
 tended for by the plaintiff, and the injustice that such an interpretation of the act would work to public officers, and to innocent persons, and neither the words nor spirit of the act, in my opinion, calling for any such interpretation, but rather excluding it, I confess, notwithstanding that my learned brothers entertain a different opinion, I feel bound to express my own, and to state that, in my opinion, this action of trover cannot be sustained. I take it that the sheriff, rightfully seizing under a *fi. fa.* the proper goods of the debtor, and having no notice of any transfer, either by the act of the party, or subsequent secret act of bankruptcy that could confer on any third person an interest in such goods, may sell the goods that he has seized, it being his duty in execution of the writ so to do, for which there is abundance of authority; and that having sold the goods, he must, in law, be considered as holding the proceeds for whosoever may be justly entitled hereto; and that he, or the execution creditor, if he delivers the proceeds of the sale to him, may be sued for the same in an action for money had and received by the assignees.

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PENNEFATHER, B.—Baron *Richards* has stated the facts of this case, and the views which he has taken of it, with great clearness; but I am bound to say, that the view I take of the case differs from that which strikes him. I think, that in order to give effect to the 126th section of the Bankrupt Act, upon which we have been

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commenting, we must hold that the creditor of a trader, by judgment on confession, who has seized the goods of the trader, and after an act of bankruptcy by the trader, has sold them under an execution, is answerable to the assignee for their value in this form of action. It appears that no case has been decided exactly upon this point ; but the decisions that have been made appear to me to authorize the construction which, independantly of those cases, I would be inclined to put upon this act. It must be remembered that this is a question arising upon the bankrupt laws, and the policy of those laws is, that no preference shall be given to any creditor, except where expressly permitted by them. The 126th section of the 6 Will. IV. c. 14, enacts, that no creditor of a bankrupt shall be entitled to a preference, except he has issued execution, and has actually had the goods of the bankrupt seized ; and then the proviso at the end of the section takes out of the benefit of the exception, the creditor who has obtained his judgment by virtue of a warrant of attorney ; I think, therefore, that such a creditor is to be considered as a creditor who has *no* security for his debt : in order to carry the object of the legislature into effect, I think his hands, and the hands of those he may have set in action, are to be considered as tied ; and that he cannot, by retaining the proceeds of a sale for any portion of time, derive an advantage over the other creditors. If any thing short of that were to be held, and if the property in the goods were to be considered as vested in such an execution creditor, great detriment would ensue to the other creditors ; because the case of a sale at an under-value could not be reached ; the goods of the bankrupt, to which the other creditors are rateably entitled, might be sold at one-fourth of their value ; and the only remedy the other

creditors would have, would be to recover the money produced by the sale, by an action of assumpsit; a slow remedy, and one which probably would never recompense them for the injury sustained. But though it must be admitted that no decision has been made on the exact point before us, yet cases have been cited in argument, which, in my opinion, go the length of establishing the principles which are to govern it. On a corresponding statute, in *England*, it has been decided that the assignee can recover in an action for money had and received the price of goods seized and sold under circumstances similar to the present; that case establishes the right of the assignee against the execution creditor; and I do not find in it any expression which intimates, on the part of the Court, the impossibility of the assignee bringing an action of trover under similar circumstances. Then it has been held on the *English Insolvent Act*, 7 Geo. IV. c. 57, that trover can be maintained against the execution creditor: the words of that clause are somewhat different from those of the clause before us; for it expressly says, that after insolvency the seizure shall not be proceeded with, and no sale shall take place; but it does not say that the parties shall be tortfeasors. In order to put the estate of the insolvent in a situation in which it may be properly available to the creditors, it was held that the execution creditor must be made answerable for the value of the goods. I think the principle there established is to be extended to the present case; and I cannot see why there should be a different principle in the cases of insolvents and bankrupts. Now, let us see whether there are any words in the statute of Will. IV. c. 14, which substantially fall short of those in the 7 Geo. IV. c. 57. The principle of both enactments is equality; and

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no creditor is entitled to a preference, unless he brings his case exactly within the clause which gives him that preference. The effect of the proviso in the 126th section is, in my mind, to take out of and from the benefit of the exception, a creditor by judgment on confession, as if so far as regards him, it had never been made ; otherwise, he would avail himself of it to the prejudice of the other creditors. The object of the act is, that such a creditor shall not derive any benefit from his judgment, and shall not effect an injury upon the rest of the creditors. That object would be effected only in a limited degree, were we to hold that he shall only refund the proceeds of the sale, for while he holds the money, he would avail himself of the security for a time. But for the doubts entertained by Baron *Richards*, and my sincere respect for his opinion, I should have had no doubts of my own in this case ; but I think the object of the act can not be attained, unless the judgment creditor be held responsible, not merely for the proceeds of the sale, but for the actual value of what he has received. It certainly does press itself on my mind that injury may be done to innocent persons, in consequence of such a principle ; and that the sheriff, who has seized the goods of the debtor, should be protected against a secret act of bankruptcy, which the debtor may have committed. That consideration has made the Courts hesitate long, whether they would hold a sheriff liable in trover for the sale of goods, sold by him after an act of bankruptcy, of which he had no notice ; but upon the judgment of the House of Lords, the sheriff was held so liable, and the present case is not one of greater hardship. But the sheriff must act with discretion ; and if a writ be placed in his hands to be executed against a trader, and he suspects

any danger of a secret act of bankruptcy having been committed by the trader, the sheriff must secure himself by an indemnity. It appears to me then, that the act of bankruptcy stays the hands of all parties. The sheriff cannot sell the goods, and the execution creditor, if he do not in time countermand the authority he has given the sheriff, must be held liable for the amount of the goods if sold. He is to be paid rateably with the other creditors, but cannot avail himself of his security to their exclusion. Baron *Foster*, who has been prevented from attending here to day, concurs with me in this case.

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BRADY, C.B.—I also am of opinion that this form of action is maintainable in this case; I feel it, however, to be due to the respect I feel for the opinion of Baron *Richards*, that I should express the reasons which have induced me to come to this conclusion. I shall not discuss the analogy between the section of the 6 Will. IV c. 14, upon which this question has arisen and the nearly corresponding section of the *English Insolvent Act*; but I cannot observe any sound distinction between the one and the other. The principle of both is identical; the language of both is identical to a certain degree; and I think the meaning of the words, “no creditor shall *avail himself*,” is explained in the *Irish Bankrupt Act* by the terms of the *English Insolvent Act*, that “no person shall avail himself of any execution, &c., obtained upon such warrant of attorney, &c., either by *seizure and sale* of the property of such prisoner, or any part thereof, or *by sale* of such property *theretofore seized*, or any part thereof, but that such person to whom such sum of money shall be due in respect of any such warrant of attorney, &c., may be a creditor for the same under that act.” Now, upon this section of the *Insolvent Act*, it has

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been decided that an action of trover would lie against the sheriff who sold goods, as well as against the execution creditor whose execution had been laid on before the imprisonment of the insolvent, *Kelcy v. Minter*(a), a case not cited in argument. There it is manifest that the question of notice was not made the ground of demurrer; the whole facts are spread upon the record. In that case it was held, that trover would lie at the suit of the assignee of an insolvent debtor against the execution creditor, when the execution had been laid on before the imprisonment of the insolvent, and the sale of the goods seized had taken place afterwards. Lord Chief Justice *Tindal* there says—"It is true that nothing is said in the case " of *Notley v. Buck*, as to the liability of the execution " creditor to an action—it was not necessary; the Court " were only dealing with the sheriff. But upon general " principles, I hold it to be clear, that where one puts " another in motion, the former is responsible for all the " illegal acts of the latter that necessarily result from his " employment." To consider the case of the sheriff, concerning whom it is now settled that he is liable in trover for the seizure and sale of goods of a bankrupt, seized and sold after an act of bankruptcy has been committed:—it has been held that the property rests by relation in the assignees; and therefore that the sheriff in seizing and selling the goods, under such circumstances, has seized and sold, not the goods of the bankrupt, but those of his assignees. The question then here is, whose goods did the sheriff seize? The sheriff, by seizing the goods, acquired a special property in them; but the general property remained in the bankrupt. Had the goods

(a) 1 Scott, 616.

remained *in specie* unsold, will it be contended that they did not become the property of the bankrupt's assignee? To make the fund available for the creditors, the assignees of a bankrupt must take all his property: if the contrary position were established, the judgment creditor would be enabled to avail himself of his execution to the prejudice of the general creditors: thus—suppose the case of a seizure of leasehold property of the house, &c., of a trader, and that the assignees wished to sell it, can it be said that the execution creditor could refuse to do so? I think then the whole question resolves itself into the simple point, whose were the goods at the time of the sale? In *Whitworth v. Clifton*(a), Baron Parke puts the case on these grounds: he says—“ In *Groves v. Cowham*, “the sale, which was the act of conversion, was after the “change of property; the goods, therefore, were not “liable to the sale.” On these grounds, I must say, that I am clearly of opinion that these goods had, at the time of the sale, become the property of the assignee by the operation of the statute; and that the judgment creditor having received the proceeds of the sale, must be responsible for the consequences. The operation of this decision is not to make these parties trespassers. In trespass the damages may be greater than those directly occasioned by the mere act of trespass; but here the damages cannot be greater than the amount of the property sold. I am therefore of opinion that the rule for a new trial must be discharged.

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Rule discharged.

(a) 1 Moo. & Rob. 834.

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EXCHEQUER.
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H. C. seised in fee of the lands of D., demised the same to A., his heirs and assigns, for a term of three lives, with a covenant for renewal, "excepting to the said H. C., his heirs and assigns, all royalties, minerals, fuller's earth, &c., and bogs or turf mosses whatsoever, together with all woods, &c., with ingress, egress, and regress to dig for, fell and carry away all and every the before excepted premises, and liberty at all times for the said H. C., his heirs and assigns, to fowl, hunt, &c., upon the premises, saving always and reserving out of this exception to the lessees, their heirs, and assigns, liberty to dig out and take lime, slate, or other stone and turf moss to be spent and employed upon the premises."

HENRY CAREY being seized in fee of the lands of *Derrynaflaw*, in the county of *Londonderry*, by indenture of lease, dated 23d October, 1731, demised the same to *John Irwin, Andrew M'Cully*, and others, by the name of "All and singular that tract and parcel of land commonly called, or known, by the name of *Derrynaflaw*, situate, lying, and being, in the manor of *Pellipera*, barony of *Kenaght*, and county of *Londonderry*, to hold to the said, (lessees), their heirs and assigns, for a term of three lives, therein named, 'excepting 'always to the said *Henry Carey*, his heirs and assigns, 'all royalties, minerals, fuller's earth, clay for brick 'and earthenware, coal pits, quarries, lime, slate, or 'stone, and *bogs or turf mosses* whatsoever; together 'with all woods and underwoods, by whatsoever name 'or names called or known, then or thereafter standing, 'lying, and being, within or upon the said premises; 'with ingress, egress, and regress, to dig for, fell, and 'carry away, all and every, the before excepted premises; and liberty at all times for the said *Henry Carey*, his heirs and assigns, to fowl, hunt, and hawk 'in and upon the premises, saving always and reserving 'out of this exception to the said, (lessees), their heirs 'and assigns, liberty to dig out and take lime, slate, 'or other stone, and *turf moss*, to be spent and 'employed upon the premises, and not elsewhere, the 'same not to be cut or digged out without the order

Held, that by the above exception the subsoil of the bogs was reserved to the lessor, and that the tenant took only a right of turbary therein.

id appointment of the said *Henry Carey*, his heirs and assigns;” at the rent of £20 a year, with a grant for perpetual renewal of the said lease, on payment of £1 renewal fine on the fall of each life. In the year 1798 the estate of *Henry Carey*, the lessor, became vested in one *Henry Blacker*, who, in that year, executed a renewal in the exact terms of the original lease, to *John M'Cailly* and others, who then became the lessees of the lease of 1731. *Henry Blacker*, the reversioner in fee, by his will, dated 20th May, 1827, devised all his interest in the said lands to the defendant, the Rev. *Richard Olpherts*, who, on the death of *Blacker*, in September, 1827, became entitled to the reversion in the said lands. One of the *cestuis que vie* in the lease of 1798 had died in 1818, and in the year 1818 applications had been made by the plaintiffs, in order to have the interest of the lessees had become vested, in *Blacker* for a renewal, which he promised to execute; but *Blacker* having died before any such renewal was effected, no application was made after his death to the defendant, *Olpherts*, who at first promised to renew the lease, but afterwards refused to do so; alleging, as a defence for such refusal, that the plaintiffs had encroached on the bogs of *Derrynaflaw* in a manner which they were not entitled to do, under the original lease of 1798.

Upon the defendant, *Olpherts*’, refusal to renew, the plaintiffs served a notice upon him, calling upon him to do so, and tendering the amount of the rent and renewal fines then due, with a draft renewal for probate. Such applications were repeated in March and April, 1838, and again on the 17th May, 1838, at that year. On the 24th May, 1838, the defendant’s solicitors, Messrs. *Davison*, wrote to the plaintiffs’

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solicitor, requiring a few days to consider about the draft renewal, which time was at once granted them. Three days having passed, and no objection being made by the defendant's solicitor, the draft renewal was engrossed and tendered to the defendant for his signature. On the 4th June, 1838, notice was served by the plaintiffs of their intention to file the present bill. On the 7th June a notice in reply was served by the defendants, cautioning the plaintiffs against proceeding, and requiring till 17th June to consider the matter. On the 8th June the bill was filed, and on the same day a notice was served on the defendant's solicitor, informing him that as the defendant had refused a renewal, and had put off the plaintiffs on many former occasions, a bill had been filed; but that if a renewal were granted within a fortnight, the plaintiffs would not hold the defendant, *Olpherts*, liable for the costs of filing the bill. On the 16th June, 1838, just before the expiration of the time required by the defendant's solicitor, the draft renewal was returned with the following indorsement:—

“ We approve of the within draft, on the part of the
 “ *Rev. Richard Olpherts*, subject to the marginal obser-
 “ vations. *R. and J. Davison.*”

The plaintiffs having acceded to all the important alterations required by the defendant, and re-altered the draft only in respect of a few clerical errors: it was returned on the 22d June, 1838, to the defendant's solicitors, with a requisition that they would return it on the 27th June. The draft was not returned on that day, nor was any communication made by the defendant to the plaintiffs, till the 10th July following, when a notice was served by

defendant's solicitors, apprising the plaintiff that they had been advised, that under the original lease of 1731, the reservation of "bogs and bog-mosses" comprehended the subsoil of the bogs; and claiming that the defendant was entitled to have the renewal of the lease of the premises made with this restriction. The draft renewal was varied, making this reservation of bogs and turf-mosses to the landlord, "Whether the same bogs and bog-mosses, or any parts or part thereof have or have not since the making of said original lease been cut out and exhausted of turf and reclaimed or not." This was considered by the plaintiffs as a total variation of the original contract, and they refused to accede to the alteration; but on the 6th August, 1838, served a notice on the defendant, proposing to frame the exception of the bogs and turf-mosses to the lessor, "as fully and to the same extent as the same were excepted and reserved to *Henry Carey*, his heirs and assigns, by the said original lease of 1731, according to the intent, meaning, and construction of the same indenture of 23d November, 1731: it being thereby declared and agreed by and between the parties hereto, that whatever was excepted or reserved to the said *Henry Carey*, and his heirs, by the said original lease of 23d November, 1837, shall also be excepted and reserved out of this grant and demise to the said *Richard Olpherts*, his heirs and assigns." On the 13th August a notice in reply was served by the defendant, refusing to accept this offer, and declining to give a renewal. The lease in the renewal of 1798, expired in December, 1838. The cause now came on to be heard upon pleadings and facts. None of the facts of the case were disputed; it was admitted that the entire matter in controversy

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was the subsoil of the bogs upon the premises, which, during the previous continuance of this demise, had been cut out, and which subsoil had been improved and made arable by the tenants after the bog itself had been used and consumed by them in the exercise of the right of using the turf, granted to the lessees by the original lease. It was not contended that the tenants had made any improper use of this right.

Sergeant *Warren*, Mr. *Moore*, Q.C., Mr. *T. B. C. Smith*, Q. C., and Mr. *Montgomery*, for the plaintiffs.

At the time when the first application for a renewal was made to the defendant, no objection was made with respect to his claim to the subsoil, and he repeatedly promised to renew before any such claim was made. The improvements and the reclaiming of the exhausted bogs had all been made by the tenants with the knowledge of the landlord, and without any notice from him of any such claim as he now sets up. The reservation in the original lease is, "to enter, dig, and carry away." Now, it cannot be said, looking to what was reserved, that it was not intended that the tenant should not retain what the landlord had not carried away; there could therefore have been no encroachment by the tenant: but even if there had been an encroachment by the tenant, that would not have deprived him of his right to a renewal, *Trant v. Dwyer*(a).

The *Attorney-General*, Mr. *Martley*, Q. C., Mr. *R. Holmes*, and Mr. *Whiteside* for the defendant.—It is plain

(a) 2 Bligh, N. S. 11; 1 Dow. & Cl. 125, S. C.

that if the tenant were originally entitled to the subsoil, he is now so entitled; and if the landlord be now so entitled, he has a right to have the covenant modified in the renewal. It is admitted that the tenants have reclaimed the land and altered the denomination of it; we are therefore thrown back to the consideration of what the thing demised was, and what was the thing excepted in the lease of 1731. The effect of the exception was, that the bog remained in the landlord as if he had not executed the lease at all. In *Lord Cardigan v. Armitage(a)*, it was decided, that the effect of an exception in a lease is, to leave the lessor seized of the thing excepted as in his original estate and title. If, then, the bogs and mosses were not granted to the tenant by the lease of 1731, they are now the fee-simple of the landlord; and the change of denomination from bog to arable land, is not to operate to his prejudice. The exception gave to the tenant a qualified right to cut turf, which would be wholly nugatory if the soil itself passed to him. The whole of the plaintiff's case is, that he has encroached, but that his landlord has permitted the encroachment.

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[PENNEFATHER, B.—We feel disposed to direct an ejectment to be brought for all these bogs and mosses, or what were bogs and mosses at the execution of the lease of 1731, which is to be considered as still in force; no temporary bar to be set up; and the jury to specify the amount of the parcels; and to lay the landlord under orders to furnish a map to the plaintiffs, upon which the parcels sought by the ejectment shall be marked(b).]

(a) 2 B. & C. 196.

b) A nearly similar course was pursued in *Irons v. Douglas*, 3 Ir. Eq. Rep. 601.

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Mr. *Holmes* submitted that the venue should be laid in a different county from that wherein the lands lay.

[PENNEFATHER, B.—That is never done.]

After the Court had consulted for some time,

BRADY, C. B. said—A great deal of expense would be incurred in such an ejectment as we contemplated, which, after all, may end in bringing back this question for decision here, either on a bill of exceptions, or a motion for a new trial; and we should have to give the same opinion then, sitting as a Court of Law, which we are just as competent to do now, sitting as a Court of Equity. If the question as to the construction of the lease be decided in favour of the defendant, then a question of quantity may arise, which will be matter for a trial at law, which the Court may mould as it shall think proper; but if the Court now construe the lease in favour of the plaintiffs, the question will be decided altogether, so far as we can decide it; and the other party will still have his right of appeal. We shall therefore hear argument as to the construction of the lease.

And the Court called on Mr. *T. B. C. Smith*.

Mr. *Smith*.—The exception is not of the *soil*, but of “bogs and turf-mosses.” It would be highly inconvenient to hold that when the tenant, in the exercise of his right, had cut out the different portions of bog dispersed through the premises, the landlord should then be entitled to the patches of the subsoil here and there. Besides, the excep-

tion of the "bogs" is illustrated and explained by the words "turf-mosses," which clearly do not comprehend the subsoil, and only refer to an easement. If, then, "turf-mosses" cannot be considered as words excepting to the landlord more than the surface, the word "bog" cannot be considered as vesting in him the soil, for it is merely used in conjunction with the synonymous term "turf-mosses," according to the usage of conveyancers. [RICHARDS, B.—Is not a "turf-moss" a bog?] Bog might possibly mean the subsoil, but the other phrase is less ambiguous. [FOSTER, B.—I should say that there is a large portion of Ireland where the word bog is quite unknown, such lands being always termed mosses.] But the reservation enables the lessor "to dig for, fell, and carry away" the excepted premises: it cannot be contended that he was to "carry away" the subsoil. Therefore the words must mean something distinct from the land itself.

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Mr. Martley, Q.C., and Mr. Holmes, on the other side. *Thur. Nov. 18.* There is a distinction between an exception and a reservation; an exception must be of part of the thing granted, a reservation is of a thing not in esse; *Co. Litt.*, 47 a. The words of this exception are purposely used in their strict meaning; and what will pass by words in a grant will be excepted by the same words in an exception; *Shep. Touchst.*, 100. "Bog," in its ordinary import, means *land* of a particular quality, and not a mere easement; and "turf moss" *may* mean the same thing, though in a different part of the exception it is admitted to mean an easement. The word moss is used as synonymous with land in several statutes, as

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the *English* act concerning moss troopers, 13 & 14 Car II. c. 22; and the *Irish* acts, 5 Geo. II. c. 9; 11 & 12 Geo. III., c. 4; 30 Geo. III. c. 20, sect. 21. [FOSTER, B.—It strictly has that meaning in the north of *England* and in *Scotland*.] [PENNEFATHER, B.—There is no doubt but that a grant of bog would pass the soil.] It has been argued that the saving of the right of ingress is inconsistent with the exception of *land*, because that right would not be necessary to such a reservation; but in *Whistler v. Paslow*(a) it was held that such a saving of a right of ingress was not inconsistent with an exception which was held to except the soil; *Pincombe v. Thomas*(b) is inconsistent with the former case. It is usual to insert such rights of entry in conveyances, *ex abundanti cautela*. [BRADY, C. B.—In p. 95, of *Shepherd's Touchstone*, *Pincombe v. Thomas* is cited to show that a right of entry qualifies the reservation; but in *Atherley's* edition it is made a *quere*, whether these words can make any difference.] The word “moss” in the singular number has not the same meaning as “mosses” in the plural; a man speaking of *turf moss* must mean turf, but speaking of *turf mosses* he must certainly mean bogs. A reservation of “timber trees, *wood*, and underwood,” has been held not to have the same signification as a reservation of timber trees, *woods*, and underwood; *Legh v. Heald*(c). [PENNEFATHER B.—If we are to suppose the exception to be confined to turf mosses, and that then the right to turf mosses is reserved to the tenant, would not that be to give in one clause what is taken away by the other?]]

(a) Cro. Jac. 487.

(b) Ib. 524.

(c) 1 B. & Ad. 622.

Mr. Moore, Q.C., in reply.

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This question has not arisen for the first time in this case. In the year 1818, a bill was filed in this Court by a person named *Osborne*, against Mr. *Blacker*, who was then the landlord of all this property in question, for a renewal; and on that occasion it was referred to Baron *Smith* (according to the then practice of this Court) to settle a renewal, in which he excepted all bogs and mosses that were such at the time of the renewal, giving the tenant the bog that was then cut out, so that the plaintiffs have had the opinion of a Baron of this Court in favor of what they now contend for. In *Legh v. Heald(a)*, Justice *Pattison* said that the meaning of the exception in that case was not to be derived from the word "wood" only, but from all the other language with which it was accompanied; now here many things are excepted, which it cannot be contended would pass the soil in a grant; royalties, minerals, (*Shep. Touch.*, 98, and Mr. *Preston's* note,) fuller's earth, coal pits, (*Lord Cardigan v. Armitage*), quarries, and woods, and underwoods, which last would not pass the soil here, as they are particularised by the explanation, "standing, growing, or being then or thereafter on the premises;" *Shep. Touch.*, 94, *Preston's* note. The law has not, indeed, fixed a definite meaning upon the words, "bog and turf moss," but the Court will refer to all the other reservations in the deed to explain them, upon the principle of *noscitur a sociis*. *Bog* is not a word of magical meaning, but its sense may be cut down and

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 BOYLE same meaning both in the exception and in the reserva-
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BRADY, B.—In this case a bill has been filed by the plaintiffs, claiming a renewal under a covenant contained in a lease of the 23d October, 1731, and an adjudication by this Court of their rights under that instrument. It is contended on the part of the plaintiffs, that by the words of the exception contained in that lease respecting the bogs, nothing was excepted to the landlord but a right, in the nature of a common of turbary, of cutting turf upon the demised premises; and that the tenant retained an absolute property in the soil of the bogs for all other purposes, as well in those which had been cut out, as in the uncut bogs, in which he admits the landlord had a right of turbary, and in which the tenant had a privilege of cutting turf for his own use. The original quantity of arable land demised by the lease of 1731, was about 250 acres, and the quantity of bog upon the premises at the time was about 350 acres. Now this, though not very material, cannot be disregarded in the construction of the instrument, for it is now contended on the part of the tenant, that the intention of the lessor was that he should give to the tenant all the subsoil of the bogs, according as they should be gradually cut out and reclaimed. There has been no case cited in argument directly showing that the words "bog," or "moss," have any particular definite meaning; but on the plain construction of this instrument, I think these words must be intended to mean land in that particular condition. By a grant of bogs, *eo nomine*, lands will pass undoubtedly. The word nearest in signification to these which I have been able to

n the books, is heath, it is said in *Coke* upon p. 4, b, that if a man grant "*omnes brueras* soil will pass: so here we have an authority as meaning of that word; "bogs," and "turf-mosses," resemble it nearly; so it would appear to me those words also the soil might pass. Certain so have been cited in explanation of these terms; urged by the defendant's counsel that "*turf-moss*" is a moss, capable of producing turf; but it is the other side that these terms are cut down in definition by the subsequent words, "with ingress, and regress, to dig for, fell, and carry away all and before excepted premises." However, there are words in the reservation to the landlord to which these are more applicable than they are to bogs and mosses; and considering that these are the words as qualifying the exception, I do not think it conclusively that such must be their effect. By a grant of woods," *eo nomine*, the soil will pass; but words of exception may be used therewith which may so qualify the meaning of that term as that nothing shall pass but the soil. However, all the cases, such as this, are in relation to the right of ingress, &c., reserved to the landlord. Thus it was in *Legh v. Heald*, and in *Lord Carmichael v. Wilson*, which establishes that where there is a reservation of a right of entry; so that the words "with ingress, and regress," do not necessarily imply that the words of exception in a grant are to be cut down from their meaning. An argument has been raised from the reservation to the tenant of liberty to cut turf; and it is reasonably contented that the words are to be

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taken in a different sense in the singular from that in which they are to be taken in the plural number, but on the foregoing grounds I am of opinion that the words, "bogs and turf mosses," do not pass a mere right to the landlord, but except the soil itself. I think, therefore, the tenant is to be held to have gotten the soil of all the lands, not bogs, comprised in the lease of 1731, and that in such of the lands as were bogs he got a right of turbary only; and the judgment of the Court will be, that a renewal is to be decreed upon these terms. This question, however, seems to have been fairly raised, and the parties are not to pay costs. We shall refer it to the officer to settle a draft of a renewal, having regard to this construction of the instrument.

PENNEFATHER, B.—The ordinary course in this case would have been to have referred it to the officer to settle a draft of a renewal, and we might have directed an ejectment, to try the right of these parties to the soil of the bog in question; but we thought expense might be saved them by our pronouncing our opinion at once on the effect of this instrument, as an appeal will lie from our decision directly to the House of Lords. If the words of the reservation had stopped with "bog" alone, there could not, as I conceive, have been any question about it; but the question is, what construction we are to put upon the word "mosses." I think the addition of "turf" explains "turf moss" to mean a piece of ground capable of producing turf. One exception is explained by the other. We cannot, I think, consider it as any thing else than an exception out of the thing granted; and had this instrument been a demise of the lands, saving and excepting all bogs and

turf mosses, it hardly could be contended that they passed to the tenant. The tenant gets by the subsequent reservation that which, as I think, it was the intention of the parties to give him, namely, a right of turbary. We cannot be influenced by any acts of the parties; this instrument must be construed altogether by itself.

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FOSTER, B.—I shall only express my entire concurrence with the opinions already pronounced. I have no doubt of the intention being to grant only a right of turbary, which the tenants have very fully exercised, 100 acres of bog having been cut out during a century.

RICHARDS, B., concurred(a).

(a) Compare this case with *Irons v. Douglas*, 3 Ir. Eq. R. 601; and *Massey v. Gubbins*—ante 88.

THORPE v. HERON.

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OF PLEAS.
Mon. Nov. 15.

ASSUMPSIT on a special contract. The plaintiff had let a house to the defendant under a written contract, by which the defendant agreed “to take the plaintiff’s house, No. 15, Sinnot-place, for 5 years, at £45 sterling, above premises in as good order and condition as she had received them. A., on giving up the house left some taxes unpaid. B. having taken the house, was obliged to pay the arrear of taxes due by A., and was given credit for the amount by the landlord, T., in the rent. T. brought an action of assumpsit for breach of contract. Held, that he might recover the amount so allowed in B.’s rent on the money counts.

A. contracted to take a house from T. for five years, at a certain rent “above taxes,” and to expend £20 on the house, and to deliver up the

A., on giving up the house left some taxes unpaid. B. having taken the house, was obliged to pay the arrear of taxes due by A., and was given credit for the amount by the landlord, T., in the rent. T. brought an action of assumpsit for breach of contract. Held, that he might recover the amount so allowed in B.’s rent on the money counts.

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taxes, payable half yearly," and to expend a sum of £20 in papering, &c., and to give up the house at the expiration of the term, in as good order and condition as she had received it. The declaration contained several counts on the special contract, and also the common money counts.

On the trial of this case at the Nisi Prius sittings before the Lord Chief Baron, after last Trinity Term, a witness for the plaintiff proved, that he had taken the house from the plaintiff after the defendant had left it, and that he had paid some taxes in respect of the premises, incurred during the occupation of them by the defendant, amounting to £1 15s. 4d., for which he had been allowed in the rent which he paid to the plaintiff. The learned Chief Baron had been of opinion that the plaintiff could not recover the amount of these taxes on the money counts as money paid, but saved the point for the plaintiff. The jury, under his lordship's direction, found a verdict for the defendant on the other counts(a).

Keatinge, Q. C. for the plaintiff, now moved, pursuant to the leave reserved by the learned Chief Baron, that the verdict had for the defendant be set aside, and a verdict be entered for the plaintiff on the money counts, for the sum of £1 15s. 4d., or that a new trial should be had. The question is, whether the plaintiff is entitled to maintain an action for the amount of the money allowed in the rent to the tenant who succeeded the defendant, as money paid to his use.

(a) *Vide* 1 *Armstrong & Macartney*, 178.

We submit that he is: there is no difference between this and an actual payment of the sum which the defendant ought to have discharged.

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Greene, Sergeant, M. Baker, and J. S. Townsend,
contra.

The tax-collector got these taxes after the defendant had given up possession of the house; and there having been an agreement between *Thorpe* and the succeeding tenant, about the payment of taxes, the landlord was obliged to repay him. [PENNEFATHER, B.—If a party lets a house he lets it free from the taxes due by a preceding tenant.] No demand of these taxes was proved to have been made from the defendant; but a default in payment should be shown, before the plaintiff could be entitled to call on her to pay him. It was the landlord's duty to have apprised the defendant that she left so much unpaid. [PENNEFATHER, B.—Where it was the tenant's duty to have paid the taxes, the payment of the money by the landlord is sufficient to entitle him to recover the amount. There was a liability on the outgoing tenant to pay this money, and she was then in the situation of any other person who owes a debt. In any similar case, though it may be a hard thing, a party is liable to be sued without any previous demand being made.] The new tenant could have maintained an action against the outgoing tenant for the amount he had paid. [BRADY, C. B.—He might have maintained an action against his landlord; but I do not see how he could have done so against the outgoing tenant.] There was no privity between the plaintiff and defendant in respect of these

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taxes, and the payment of them by the present tenant is merely voluntary. Where there is a written contract in this case there was, to pay taxes, the plaintiff declared specially on it, and cannot recover on the count for money paid, *Spencer v. Parry*(a); therefore the plaintiff should have declared specially, *Willie Henley*(b). The landlord and incoming tenant have constituted their own agreement for the primary legal liability of the landlord, and cannot now have recourse to the primary liability.

Keatinge, in reply.—In *Spencer v. Parry*, the contract which imposed the tax cast the liability on the landlord, and the money paid by the plaintiff in that case was in discharge of his own liability. The agreement here is for the tenant to pay £45 a year, and is in effect silent as to the landlord's liability. The principles relating to special contracts do not apply in this case, *Grissell v. Robinson*(c).

BRADY, C. B.—A verdict must be entered for the taxes paid by the present tenant for the taxes, which were paid to him by the plaintiff in the amount of the rent for the premises. It appears to me that the parties have agreed to pay taxes without making any special contract concerning them. In the case cited for the defendant, the landlord was himself primarily bound to pay the debt which he had charged, and the parties had, by a special contract, relieved the landlord and cast the liability on the tenant. That case therefore does not govern the present case.

be entered for £1 15s. 4d. for the plaintiff on the counts for money paid: the verdict stands for the defendant on the other points of the case.

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No costs of this motion.

CONNOR v. CONNOR.

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EXCHEQUER
OF PLEAS.
Tues. Nov. 16.

THIS was an application to enter judgment on a warrant of attorney, which was in the usual form, authorising judgment to be entered, on a "bond for the penal sum of £200, bearing equal date with these presents." No bond was in fact ever executed—The warrant was given as a collateral security for a mortgage. The Court refused the application; observing, that if such a practice were permitted, it would furnish a ready mode of evading the necessity of executing bonds at all, and the consequent payment of the stamp duty.

Application to enter judgment on a warrant of attorney in the usual form, authorizing entry of judgment on a money bond, no bond having been, in fact, executed. *Refused.*

Application refused.

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EXCHEQUER
OF PLEAS.

Tues. Nov. 16.

LORD ASHTOWN v. BURKE.

TRESPASS *de bonis asportatis*; plea, the general issue. At the trial of this case before Baron *Richards*, it appeared that this action was brought by the plaintiff, the late high sheriff of the county of *Galway*, against the defendant, a bailiff of the present sheriff, for taking goods which had been seized by the plaintiff's deputy, under the following circumstances:—The plaintiff being high sheriff of the county of *Galway*, in the year 1840, a *fi. fa.* issued at the suit of of *Thomas Graydon*, against the Rev. *George Dwyer*, marked for £462 18s. 4d.; which was delivered to Mr. *J. H. Cowan*, the sub-sheriff of Lord *Ashtown*, on the 8th of February, 1841. On the 10th or 11th of February, (it did not precisely appear on which day) *Cowan* granted a warrant, directed to two persons named *Kane* and *Lally*, under which *Kane*, on the evening of the 11th February, seized the goods of *Dwyer*, the defendant in the execution. The goods were, however, not removed from *Dwyer's* premises; but were left there in the care of the bailiffs; *Dwyer* being permitted to use them, after the seizure as he had been used to do before it. On the 6th of February preceding the seizure, the Lord Lieutenant's warrant issued, appointing Mr. *Andrew William Blake* high sheriff of the county of *Galway*, for the ensuing year; and between ten and eleven o'clock, on the morning of the 11th February, Mr. *Blake*, and his sub-sheriff Mr. *Stratford*, A. being sheriff of G. for the year 1840, a *fi. fa.* issued against D., on which A.'s sub-sheriff issued a warrant to seize D.'s goods. The goods were accordingly seized on the evening of the 11th February, but not removed from D.'s premises. On the 6th February, B. had been appointed sheriff of G. for the ensuing year, and on the 11th February, B. and his sub-sheriff were duly sworn in. On 17th February, the list of writs and prisoners was handed over to the in-coming sheriff, pursuant to 5 & 6 W. IV. c. 55, s. 6, but the writ against D. was not included therein. On the 28th February, another *fi. fa.* issued against D., by virtue of which B.'s sub-sheriff, by X. his bailiff, sold the goods already seized by the former sheriff under the former *fi. fa.* A. brought trespass *de bonis asp.* against X.

Held, that such action was well brought.

ford, took the oaths of office, (which were duly enrolled in the proper office) in *Dublin*. On the 17th of February following, Mr. *J. H. Cowan* returned, and handed over to Mr. *Stratford*, as the succeeding sub-sheriff, the list required by the 5 & 6 Will. IV. c. 55. s. 6(a), of writs in his

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(e) The 5 & 6 Will. IV. c. 55. s. 2, provides, that "whenever any person shall be duly nominated by the Lord Lieutenant or other chief governor or governors of *Ireland*, for and to be sheriff of any county in *Ireland*, such appointment shall be forthwith notified in the *Dublin Gazette*, and the appointment of every such sheriff shall be made by a warrant under the signature or signatures of the said Lord Lieutenant, or other chief governor or governors of *Ireland*, according to the form set forth in the schedule, hereto annexed, which schedule and every thing therein contained, shall be deemed and be a part of this act; and every such warrant shall be made out by the chief or under secretary of the said Lord Lieutenant, or other chief governor or governors, and shall be by him transmitted to the person so nominated and appointed sheriff as aforesaid; and the appointment of sheriff thereby made shall be as good, valid, and effectual in the law to all intents and purposes whatsoever, as if the same had been made by patent under the great seal of *Ireland*, or by any ways and means heretofore in use; and the sheriff and sheriffs so nominated and appointed as aforesaid, shall thereupon, and upon taking the oath of office hereafter mentioned, but not before, have and exercise all powers, privileges, and authorities whatsoever, usually exercised and enjoyed by sheriffs of counties in *Ireland*, without any patent, writ of assistance, or other writ whatsoever, or entering into recognizance by himself or sureties, and without payment of or being liable to pay any fees whatsoever for the same."

Section 3rd enacts, that the sheriff shall transmit the duplicate of appointment of his under sheriff to the secondary of the Chief Remembrancer of the Court of *Exchequer* within one month after such appointment, to be filed among the records of his office.

Section 5th enacts, "that each and every person so appointed sheriff and under-sheriff as aforesaid, shall, before he enter upon the execution of his office, take the oath heretofore and now required by law; which oath shall be fairly written on parchment, without being subject to stamp duty, and signed by him, and shall and may be sworn before the Barons of his Majesty's *Exchequer*, or any of them, or before the said Chief Remembrancer, or any Commissioner for taking affidavits at the said court, and the same shall be thereupon transmitted to the said secondary, who is hereby required to file the same among the records of his office, for which he shall be entitled to demand and have from such sheriff or under-sheriff the sum of five shillings, and no more; and no sheriff or under-sheriff shall act as such until such affidavit shall be lodged with such secondary, on pain of forfeiture for any

and Co., and was delivered to Mr. *Stratford* ; who, the defendant *Burke*, seized the goods which he already seized under the execution at Mr. *Grayd* and having sold the same, handed over the to Messrs. *Calwell*, on the 30th of April 1864. The plaintiff gave in evidence the attested the oath taken by him, as high sheriff, on

“ act so done a sum of £100 to any person who shall sue for it
Section 6th enacts, “ that every sheriff of any county, city
“ division, town corporate or place, shall, at the expiration of
“ make out and deliver to the new or incoming sheriff, a true and
“ list and account under his hand of all prisoners in his custody
“ writs and other process in his hands not wholly executed by
“ all such particulars as shall be necessary to explain to the
“ ing sheriff, the several matters intended to be transferred to
“ shall thereupon turn over and transfer to the care and custody
“ said incoming sheriff all such prisoners, writs and process
“ records, books, and matters appertaining to the said office
“ and the said incoming sheriff shall thereupon sign and give
“ of such list and account to the sheriff going out of office, to
“ same shall be a good and sufficient discharge of and from all
“ therein mentioned and transferred to the said incoming sheriff
“ further charge of the execution of the writs, process, and other
“ therein contained, without any writ or discharge or other writ
“ ever; and the said incoming sheriffs shall thereupon stand
“ charged with the said prisoners, and also with the execution
“ of the said writs, process, and other matters contained in the
“ and account as fully and effectually as if the same writs and
“ had been turned over by indenture and schedule; and in case
“ riff shall refuse or neglect at the expiration of his office to

pointment, and the deed of deputation whereby he appointed Mr. *J. H. Cowan* his sub-sheriff. The defendant having called for a nonsuit, on the ground that no evidence had been given of the enrolment of the deputation of Mr. *J. H. Cowan*, or of his having taken the oaths of office, the learned Baron saved that point for the defendant. The plaintiff also went into evidence to prove that the debt from Mr. *Dwyer* to Mr. *Graydon*, was a *bona fide* debt, which point the learned Baron left to the jury. The jury found for the plaintiff.

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Keatinge, Q. C., with whom was *Monahan*, Q. C., for the defendant, now moved that the points saved be ruled in favour of the defendant, and a verdict entered for the defendant; or, that the verdict had for the plaintiff should be set aside as being contrary to the weight of evidence. The sub-sheriff did not seize these goods while the plaintiff was sheriff of the county: Lord *Ashtown* ceased to be sheriff when the oaths of office were taken by his successor on the morning of the 11th February. It is plain from the words of the 6th section of the 5 & 6 Will. IV. c. 55, that every writ should be transferred from the outgoing to the incoming sheriff, which had not been wholly executed. The *fi. fa.* in question is not included in the list given by Mr. *Cowan*; and his successor has been completely misled by this omission of duty on the part of the representative of Lord *Ashtown*. The second writ was put into Mr. *Stratford's* hands, and it was his duty to execute all writs lodged with him for execution; he was fully competent to make the seizure legally on the evening of the 11th. [PENNEFATHER, B.—Is the former sheriff put out of office by the mere appointment of the

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new sheriff, without any notification whatever?] There cannot be two sheriffs. [PENNEFATHER, B.—The outgoing sheriff has the custody of all the prisoners in his charge till he hands them over to his successor; therefore there are two sheriffs to a certain extent. It would be very dangerous to hold otherwise. The former sheriff *is* still sheriff, for many purposes, after the appointment of his successor.]

The defendant's counsel did not insist upon the point saved, touching the non-inrolment of the appointment of Lord *Ashtown's* deputy.

Greene, Sergeant, *Armstrong*, Q.C. and *T. H. Graydon*, for the plaintiff.—The power and the liability of the outgoing sheriff continue until he has notice of the appointment of his successor. *St. John's case*(a), *Fitz's Case*(b), *Boucher v. Wiseman*(c). The question whether the sheriff who begins the execution of a writ shall also conclude it, was not altered by the new statute. The mode of transferring writs by the old law was by indenture, to which a schedule was annexed of the writs and prisoners in the hands of the outgoing sheriff. The new act has merely substituted a list for this formal indenture. The sheriff who begins must also finish the execution of a writ, *Clerk v. Withers*(d), *Mildmay v. Smith*(e), *Ayer v. Aden*(f). As to the *bona fides* of the execution the sheriff has nothing

(a) Sir F. Moore, 186, 364.

(c) *Ib.* 440.

(e) 2 Sand. 344. a.

(b) Cro. Eliz. 12.

(d) 1 Salk. 323.

(f) Yelv. 44.

do with that : it is a question between the two judgment
reditors.

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Monahan, Q. C., in reply.—The cases cited would have been applicable under the old law ; but by the new act, section 2, the sheriff is thenceforth to be appointed by the warrant of the Lord Lieutenant, or other chief governor of Ireland. The old practice was to appoint the sheriff by patent ; and when he was so appointed, the former sheriff sued out a writ of supersedeas. [PENNEFATHER, —The sheriff was, and still is, appointed during pleasure, and therefore the supersedeas was necessary ; but is now done away with by the new act.] The time when the supersedeas was sued out pointed at the period when the duty of the new sheriff commenced ; but under a true construction of the 6th section, the former sheriff must be held to be apprised of the appointment of the new sheriff, and to be bound to hand over to him for execution all writs not wholly executed ; although under the old law where there was a writ partially executed, that it was never included in the indenture by which the writs and prisoners were handed over.

PENNEFATHER, B.—The entire section is explained by the concluding words, which provide for the handing over of the writs and prisoners as if the old indenture had been executed.

Per Curiam.—We think the plaintiff entitled to hold

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EXCHEQUER
OF PLEAS.
Nov. 25.HIBERNIAN GAS LIGHT COMPANY
v. PARRY.

The *Hibernian Gas Company* having supplied Gas to a hotel, of which M. & L. were proprietors, for the price of which Gas M. & L. were indebted to the *Gas Company*, the defendant, who was the receiver of the profits of the hotel for M. & L., gave an undertaking to the *Gas Company* as such receiver, and with the sanction of M. & L., that the sum so due should be paid within six months from the date thereof, and also undertook that the future supply of Gas to the above concern should be discharged by him (the defendant) as it should become due, until further notice.

Held, on demurrer, that a sufficient

consideration of forbearance to sue appeared on the face of this undertaking to entitle the *pany* to maintain assumpsit.

ASSUMPSIT on the following guarantee, given defendant to the plaintiffs:—

“ I hereby undertake, as the receiver of *Home’s Usher’s-quay*, and with the sanction of *Luscombe and Joseph Denis Mullen, Esq.*, a sum of £32, due to the *Hibernian Gas Light* for gas supplied to the above concern, shall within six months from the date hereof. An undertake that the future supply of gas to the concern shall be discharged by me, as it may due, until you shall have further notice.”

The declaration contained several counts, the which was as follows:—Whereas, before the of the promises and undertakings of the said defendant hereinafter next mentioned, the said plaintiffs, on the 24th day of March, 1837, to wit, at *Dublin* the county of the city of *Dublin*, at the special and request of one *Joseph Denis Mullen* and one *Luscombe*, sold and delivered to the said *Joseph Mullen* and General *Luscombe* divers goods,

and merchandizes, to wit, divers large quantities of gas, of the said plaintiffs, of great value, to wit, of the value of £32; and which said gas had been, and was then and there, and at the request aforesaid, supplied to a certain hotel, to wit, *Home's Hotel*, in the city of Dublin, whereof the said defendant afterwards, to wit, on the 28th of April, 1837, had notice; to wit, at *Dublin* aforesaid, in the county of the city aforesaid. And whereas the said *Joseph Denis Mullen* and the said General *Luscombe*, and the said plaintiffs, then and there accounted together of and concerning the said gas, so sold, and delivered, and supplied as aforesaid; and upon such accounting the said *Joseph Denis Mullen* and the said General *Luscombe* were then and there found to be in arrear, and indebted to the said plaintiffs in the said sum of £32, to be paid by the said *Joseph Denis Mullen* and the said General *Luscombe* to the plaintiffs when they should be thereunto afterwards requested; whereof the said defendant then and there had notice. And whereas also the said defendant was then and there receiver of the said *Home's Hotel*, and the receiver of the monies and profits arising in the said hotel, to and for the use of the said *Joseph Denis Mullen* and said General *Luscombe*, and thereupon afterwards, to wit, on the 28th day of April, at *Dublin*, &c., in consideration hereof, and also in consideration that the said plaintiffs, at the special instance and request of the said defendant, would forbear and give time to the said *Joseph Denis Mullen* and General *Luscombe* for the payment of the said sum of money, until and for the space of six months, from the 28th April, 1837, to wit, until the 28th day of

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October, 1837, he, the said defendant, by a certain note or memorandum in writing, signed by him, the said defendant, as receiver of *Home's* Hotel, and with the sanction of the said General *Luscombe* and the said *Joseph Denis Mullen*, undertook, and then and there faithfully promised the said plaintiffs, amongst other things, to pay them, the said plaintiffs, the said sum of £52, within the space of six months from the said 28th April, 1837. And the said plaintiffs aver, that the said defendant then and there continued such receiver of *Home's* Hotel, and of the said *Joseph Denis Mullen* and General *Luscombe*, for and during the space of six months, then next following the said 28th of April, 1837; and as such receiver did then and there receive from and out of the said *Home's* Hotel, divers large sums of money, amounting in the whole to a sum greater than the said sum of £32; and the said plaintiffs aver that they, confiding in the said promise and undertaking of the defendant so made as aforesaid, did forbear and give time to the said *Joseph Denis Mullen*, and the said General *Luscombe*, for the payment of the said sum of money, for and during and until the full end and expiration of the said six months; to wit, until the said 28th day of October, 1837, to wit, at *Dublin*, &c.; but that the said *Joseph Denis Mullen*, and the said General *Luscombe*, although they were afterwards, to wit, on the 28th day of October, 1837, to wit, at *Dublin*, &c., requested by the said plaintiffs so to do, have not, nor has either of them as yet paid the said sum of money, or any part thereof, to the said plaintiffs; but have hitherto wholly neglected and refused so to do; whereof the said defendant afterwards, to wit, in the day and year

last aforesaid, there had notice, and thereby, and according to the tenor and effect of his said promise and undertaking, he the said defendant became liable to pay to the said plaintiff the said sum of money, on the said 28th day of October, 1837, to wit, at *Dublin*, &c.; but the said defendant hath not paid the sum, or any part thereof to the plaintiffs.

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The second count was the same as the first, only omitting the name of *Luscombe*; and the third count the same as the first, only omitting the name of *Mullen*. The fourth count was as follows:—

“ And whereas also the plaintiffs heretofore, to wit, on the 24th day of March, 1837, to wit, at *Dublin*, &c., at the special instance and request of one General *Luscombe* and one *Joseph Denis Mullen*, had sold and delivered to the said *Joseph Denis Mullen* and said General *Luscombe*, divers goods, to wit, divers large quantities of gas of the said plaintiffs, of great value, to wit, of the value of £32, and which said gas had been, and then was then and there applied to a certain concern, to wit, a certain hotel, to wit, *Home's Hotel* on *Usher's-quay*, in the city of *Dublin*, whereof the said *Joseph Denis Mullen* and the said General *Luscombe* were proprietors; whereof the defendant afterwards, to wit, on the 28th day of April, 1837, had notice, to wit, at *Dublin*, &c. And whereas also the said defendant was then and there the receiver of the said hotel and the receiver of the monies and profits to be received in the same, to and for the said *Joseph Denis Mullen* and General *Luscombe*; and thereupon afterwards, to wit, on the said

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28th of April, 1837, to wit, at *Dublin*, &c., in consideration thereof, and also in consideration that the said plaintiffs at the special instance and request of the said defendant would forbear and give time to the said *Joseph Denis Mullen* and General *Luscombe* for the payment of the said sum of money until the said 28th October, 1837; and also in consideration that the plaintiffs, at the special instance and request of the said defendant would supply gas to the said hotel, he, the said defendant, by a certain note or memorandum in writing, signed by him the said defendant as the receiver of *Home's Hotel*, *Usher's-quay*, and with the sanction of the said General *Luscombe* and the said *Joseph Denis Mullen* undertook, and then and there faithfully promised the said defendants, that the said sum of £32, due to the said plaintiffs for gas supplied to the above concern, to wit, *Home's Hotel*, and due on the 24th day of March then last, should be paid within the space of six months from the said 28th of April, 1837; and that the future supply of gas to the above concern, meaning the said hotel, should be discharged by the defendant as the same should become due until the said plaintiffs should receive further notice. And the said plaintiffs aver, that the said defendant then and there continued such receiver of *Home's Hotel*, and of the said *Joseph Denis Mullen* and General *Luscombe*, for and during the space of six months thence next following the said 28th April, 1837; and that the said defendant then and there continued such receiver of *Home's Hotel* and of the said *Joseph Denis Mullen* and General *Luscombe*, until the 29th day of June, 1838; and as such receiver did then and there receive from and out of said *Home's Hotel* divers large sums of money, amount-

ing in the whole to a sum greater than the sum of £32, and the sum or price of gas supplied to the said hotel after the 28th April, 1837. And the said plaintiffs further aver, that they, confiding in the said promise and undertaking of the said defendant so made as aforesaid, did forbear and give time to the said *Joseph Denis Mullen* and the said General *Luscombe* for the payment of the said sum of money, until the 28th October, 1837, to wit, at *Dublin*, &c.; and that the said plaintiffs did, from and after the said 28th April, 1837, to wit, at &c., supply gas to the said hotel; to wit, divers large quantities of gas; to wit, the amount in value of £200, without having received any further notice; and that the said defendant continued such receiver for and during the time wherein such supply of gas was made and given as last aforesaid; but the said General *Luscombe* and *Joseph Denis Mullen*, although they were afterwards, to wit, on the 28th day of October, 1837, to wit, at &c., requested by the said plaintiffs so to do, have not as yet paid the said sum of £32 above mentioned, or any part thereof, but have hitherto wholly refused and neglected so to do, whereof the defendant afterwards, to wit, on the day and year last aforesaid, had notice; and thereby, according to the tenor and effect of his said promise and undertaking, he, the said defendant became liable to pay to the said plaintiffs the said sum of £32 on the said 28th day of October, 1839, to wit, at &c.; but the said sum of £32 was not paid within the said space of six months, or at all by the said defendant, or any other person; nor was the said future supply of gas to the above concern discharged by the defendant as it became due, or at all; nor did the said defendant ever pay the said plain-

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tiffs for the gas supplied by the plaintiffs to the said hotel after the said 28th day of April, 1837 ; but on the contrary thereof a large sum, to wit, the sum of £43 9s. 5d. became and was and still is due to the said plaintiffs for gas supplied to the said hotel from and after the said 28th of April, 1837, whereof the said defendant afterwards, to wit, on the 25th day of June, 1838, to wit, at &c., had notice ; and thereby and according to the tenor and effect of his said promises and undertaking, he, the said defendant, became liable to pay the plaintiffs the said several sums of money, to wit, at &c.

The 5th count was similar to the 4th, only omitting the name of *Luscombe* ; and the 6th count similar to the 4th, only omitting the name of *Mullen*. The declaration contained also the ordinary money counts.

The defendant pleaded to the 1st, 2d, and 3d counts, *actio non*, because he saith that the said several promises and undertakings of him the said defendant in that behalf alleged, respectively were and are special promises and undertakings, and each of them is a special promise and undertaking to answer for the debt of certain other persons, to wit, the said General *Luscombe* and *Joseph Denis Mullen*, and not for the debt of him the said defendant, and contained in the said note in writing in the said 1st, 2d, and 3d counts in that behalf mentioned, bearing date a certain day and year, to wit, the 18th day of April, in the year 1837, and in the words and figures following, and not otherwise, that is to say, (setting out the guarantee

ante, p. 344). And this the defendant is ready to verify.—
Wherefore he prays judgment, &c.

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The defendant pleaded to the 4th, 5th, and 6th counts, a plea precisely similar, only omitting the date of the memorandum in writing, and pleaded non-assumpsit to the rest of the declaration. The plaintiffs demurred generally to the two first pleas, and joined issue on the plea of non-assumpsit. Joinder in demurrer.

Macdonough in support of the demurrer. The three first counts state the promise made by the defendant as to the arrears as a distinct agreement; and the question upon this part of the case is, whether a consideration to support that promise is expressed upon the instrument, or can be collected from the whole tenor of the writing. The second class of counts avoids the objection of variance and includes the past and future supply. It will be convenient, in the first instance, to argue the case as if the self same question was raised in the consideration of these counts; for, though it is quite clear that the promise to pay for the subsequent supply is an original, and not a collateral undertaking, yet, as it may be said that the declaration states the contract as *entire*, it will facilitate the argument to show that no part of it is void. It is now settled that it is sufficient, if the consideration can be gathered from the whole tenor of the writings, and it is not necessary that it should be stated on the face of it in express terms, 1 *Wms. Saund.* 211, note c. In *Mason v. Ritchard*(a), it is said, “These instruments are to be taken as strongly against the person giving the guaran-

(a) 12 East. 227.

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“tee as the sense of them will admit.” In *Newbury v. Armstrong*(a), Chief Justice *Tindal* says, “The question here is, whether a consideration appears on this agreement, is it to be collected from it by fair and necessary inference?” And adds—“We ought not to be too strict in the construction of these instruments, for, if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life.” *Emmett v. Kearns*(b), illustrates the extent to which the courts have gone, in order to deduce a consideration from such an instrument. Now, what is the situation of the parties here? Who are the parties to this instrument? The defendant signs the undertaking as receiver; he does so with the sanction of his principals, as a person in possession of their property; the plaintiffs are parties or privies to this arrangement; an arrangement retrospective and prospective is entered into; the past arrear is stated, its amount ascertained, a fund is allocated for the payment of such past arrear, and a provision is made so as to insure punctual payment of each future debt as it arose. Is not the contract for forbearance naturally to be implied from an instrument worded as this is? It is not a mere absolute or abstract undertaking of a party to pay the debt of another; but the relation of the parties is indicated by the document, and every one of the circumstances stated therein demonstrates the true nature of the contract—a contract for forbearance. The defendant was in receipt of the profits of the hotel, which were arising *de die in diem*, and the time is measured within which the fund would discharge the debt. Forbearance is necessarily involved

(a) 6 Bing. 201.

(b) 7 Scott, 787.

in the mode of payment arranged—that mode was arranged, first, by the owners of the fund whence the payment was to be made, for the defendant makes the arrangement as their agent and with their sanction; secondly, by the defendant himself; thirdly, by the creditors, who in the very body of the document state and settle an account with their debtors. It is material to observe that the creditors make arrangements for the supply necessary for the working of the hotel, which hotel was to yield them payment of their debt by furnishing to the defendant the means of fulfilling his undertaking. So that here we have in this document an account stated, a fund pointed out, the defendant in possession of that fund, a provision made as ancillary to the productiveness of that fund, and a time limited within which payment is to be made. Surely, it is to be collected from all these things that a suspension or forbearance of the plaintiffs' demand for six months was contemplated. The document itself shows that this was not a mere voluntary promise from one person to another, but was an agreement resulting from the concurrence of the minds of both parties. It is upon this distinction that *Wain v. Warlters*(a) and *Jenkins v. Reynolds*(b) were decided. It was the technical import of the word “agreement” as contradistinguished from “promise” which led to these determinations: see note to *Morris v. Stacey*(c). I admit that the agreement must disclose the ground of the promise, the reason wherefore it was made, and the consideration which induced it; but are they not apparent, or easily and certainly collectable here? I concede that the mere

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(a) 5 East. 10.

(b) 3 Brod. & B. 14.

(c) 1 Holt. 157; 6 Moo. 101.

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naked promise of a surety to pay at a future time does not necessarily imply that the consideration for so doing was forbearance to the principal debtor in the meanwhile, *Jones v. Williams*(a); but even in that case, *Pattison, J.*, says, that if it can be collected, not as a matter of conjecture, that forbearance by the creditor during that time was contemplated, the plaintiffs' case would be established. Another large class of cases is got rid of, in which the pleader put the wrong interpretation on the construction of the document, which cases went upon the question of variance, not of absence of consideration. A third class of cases, adverse apparently to the present plaintiffs, is that in which various interpretations might be put upon the language of the undertaking and several considerations conjectured; but this case is wholly different—nothing can be more defined than the several parts of this agreement. *Raikes v. Todd*(b) was a case which strongly sustains the principle here contended for, and is valuable—1st, as showing the length to which this doctrine of “fair implication” is carried, Baron *Alderson*, at the trial and the Court above, having held that the word “secure” raised an implication that there should be a forbearance which, it might be inferred, formed part of the consideration; 2dly, it shows that the pleadings here have been rightly framed; for the consideration of forbearance, as well as that of future supply, have both been put upon the record. If, in that case, the declaration had been rightly framed, the Court would have upheld the guarantee. *Wood v. Benson*(c) differed from *Raikes v. Todd* only in the word “secure,” whence an implication of forbearance

(a) 5 B. & Ad. 1109.

(b) 8 Ad. & El. 846.

(c) 2 Cr. & Jer. 94.

raised. That these observations on *Raikes v.* well founded, will appear from the arguments *n. Follett* in *Brooks v. Haigh(a)* and the judgment of the court in that case, which was in his favor. It is important to refer to a dictum of Baron *Alderson*, of the same book; in commenting on the case *n v. Campbell(b)*, he says, "the undertaking to a debt already due, and the consideration of chance might be inferred from that fact." In *Moseley(c)* the following guarantee was held :—"I hereby guarantee the present account of *H. Moseley*, due to *R. J. Shortridge and Co., Shields*, of £112 4s. 4d., and what she may owe from this date to the 30th September next;" this decision was pronounced by the same Judges and affirmed *Wain v. Warlters*, in the case of *Jenkins v. Warlters*.

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It is, assuming this to be a collateral, and not a direct debt, what then does it amount to? In the words of Lord *Parke*, in *Andrews v. Smith(d)*, it may be regarded as analogous to a prospective assignment of a fund, with an attornment, so to speak, of the debt to that assignment. In such a state of things the debt is necessarily to be implied.

I have argued the case hitherto as though this were a collateral engagement in every respect, and not a principal undertaking. I think it right, however,

(a) 11 & El. 327 to 329.
(c) 521.

(b) 3 Moo. 15.
(d) 2 Cr. Mee. & Ros. 631.

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to suggest, that this case may possibly be deemed altogether independent of the statute of frauds. *Andrews v. Smith* is an authority to that extent. In that case it was held, that a promise faithfully to apply the funds of a debtor, which should come to the promiser's hands, in satisfaction of a creditor's debt, was not within the statute: see *Chitty on Contracts*, 512. I regard this contract as consisting of two branches, with a consideration of forbearance attached to the one and a condition of future supply necessarily involved in the other. The second class of counts pursues this view; and *Raikes v. Todd* proves that the pleader ought to appropriate the several considerations to the branches of the contract to which they are applicable. *Wood v. Benson* proves that the promise as to the future supply is an original order; and *Andrews v. Smith* goes far to show that this entire contract may be regarded as a *quasi* original undertaking. I use that case, however, coupled with the cases of *Haigh v. Brooks*, *Newbury v. Armstrong*,^(a) and *Emmett v. Kearnes*, as explanatory of the view submitted to the Court, in reference to the consideration of forbearance, and the facility of implying it from the circumstances of this case, and the relation of the parties; and upon the entire case I submit that, whether this contract be regarded as a collateral promise, or as a *quasi* original engagement, the plea furnishes no answer to the action, and this demurrer ought to be allowed.

Townsend, M'Dermott, and Napier, contra. The question

(a) 6 Bing. 201.

is here at once raised, whether a consideration for a promise to pay the past arrears sufficiently appears upon the face of this instrument, and we submit that it does not. By the statute of frauds, 7 Wm. III. c. 12, the promise to answer for the debt of another must be an agreement in writing; that is, the promise must set forth a mutuality of agreement. What is now called a consideration is in the statute called the agreement. The argument on behalf of the plaintiff is, that because the party gives a conditional undertaking, a consideration for his promise must necessarily exist; but in all cases the party who incurs a liability of this kind dictates the terms upon which he incurs it, which may not amount to a legal consideration. *Wain v. Warlters*(a) is the point; *Jenkins v. Reynolds*(b) is a still stronger case. In *James v. Williams*(c) the argument was, that an undertaking to pay the debt of another within six weeks constituted a consideration of forbearance, but the Court held the guarantee void. *Clancy v. Pigott*(d) was also similar to the present case; *Morley v. Boothby*(e). The consideration must appear upon the face of the instrument as a matter of moral certainty, as is laid down by Justice Atkinson, in *James v. Williams*(f). *Hawes v. Armstrong*(g) is a still stronger case. The consideration stated in the declaration, and none other, must be the ground of the undertaking. In *Bewley v. Whitford*(h), Chief Baron Eyre lays it down as the result of all the cases, that the consideration must be unequivocally apparent from the

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(a) 6 East. 7.

(c) 3 Nev. & M. 196.

(e) 3 Bing. 107.

(g) 7 Scott, 761.

(b) 6 Moo. 86; 3 B. & B. 14, S. C.

(d) 4 Nev. & Man. 496.

(f) 1 Nev. & M. 196.

(h) Hayes, 364.

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guarantee itself, either by express statement or necessary implication. *Raikes v. Todd*(a), cited by Mr. *Macdonough*, is clearly against him. [BRADY, C. B.—In that case they went upon the word “secure” being used; that principle would certainly make short work of many of the cases.] In *Cole v. Dyer*(b) it is laid down that when several considerations may be inferred from a guarantee it is void; now here part of the consideration is forbearance, and part the future supplies. When the consideration fails in part, it fails altogether, the agreement being entire; *Chater v. Becket*(c), *James v. Williams*(d), *Wood v. Benson*(e). Here the plaintiff has divided the contract; in the first set of counts the debt is alleged to be that of a third person, and the consideration for the promise to pay it is said to be forbearance. In the second set of counts the consideration is two-fold, forbearance as to part, and a promise to pay for the future supply. The consideration expressed in the declaration is not that expressed in the contract, but should be so; *Bentham v. Cooper*(f). The modern decisions have adhered more closely to the words of the statute of frauds than was done in some preceding case; *James v. Williams*(g), *Hawes v. Armstrong*(h). [PENNEFATHER, B.—The words of the statute are merely an “agreement;” there is no mention of consideration. It was *Wain v. Warlters* which decided that the consideration must appear upon the instrument.] If the promise is divisible, then the second set of counts is wrong. The elaborate judgment of

(a) 1 Per. & Dav. 138.

(c) 7 T. R. 201.

(e) 2 Cr. & Jer. 95.

(g) 1 Nev. & M. 196.

(b) 1 Cr. & Jer. 461.

(d) 1 Nev. & M. 196.

(f) 5 Mee. & W. 628.

(h) 5 Ad. & El. 1109.

Chief Baron *Joy*, in *Bewley v. Whitford*(a), adopts the principle of *Cole v. Dyer*(b); and the same opinion is expressed by Justice *Burton* in the judgment in *Whitmore Johnson*(c). The case of *Andrews v. Smith*(d), read on the other side, was one of an original promise, and has no application here. *Green v. Cresswell*(e) lays down the true criterion, whether the promise is original or collateral; that is, whether does the original debtor remain liable or not. Here the original parties remained the same, and the defendant incurred no liability. We submit that the plea is an answer to the alleged cause of action.

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Macdonough, in reply.—The consideration is severed in the three first counts, and alleged to be forbearance; in the three last counts it is alleged to be both forbearance and a future supply. Applying the principle of *Wood v. Mason*(f) to this case, the first part is clearly good, as a collateral consideration. The relation of the parties must be considered. The case of *Haigh v. Brooks*(g) went to the Court of Error, and must be considered to have overruled *Bewley v. Whitford*(h), and to have reverted to the original principles of the law. As commerce progressed, the rule has sprung up that these instruments are to be construed by the Court as they would be by persons of ordinary capacity, and the consideration here is very apparent to any ordinary understanding.

BRADY, C. B.—This case has been argued at great

(a) *Hayes*, 364.

(c) 1 *Jebb & S.* 8.

(e) 2 *Per. & D.* 435.

(g) 10 *Ad. & El.*

(b) 1 *Cr. & Jer.* 461.

(d) 2 *Cr. Mee. & Ros.* 627.

(f) 2 *Cr. & Jer.* 95.

(h) *Hayes*, 360.

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length, and with very great ingenuity and research, by counsel at both sides; and the Court, in giving its judgment, has the advantage of doing so after all the authorities upon the subject have been submitted to it. The question merely is, whether on the face of this instrument there appears, either expressly or by necessary inference, a sufficient consideration to sustain the defendant's promise. The important consideration alleged is the contract by the *Hibernian Gas Company* to give time for the payment of the debt of £32, due to them by *Luscombe and Mullen*. The words of the instrument are these:—
 “ I hereby undertake, as the receiver of *Home's Hotel*,
 “ *Usher's-quay*, and with the sanction of General *Luscombe*
 “ and *Joseph Denis Mullen*, Esq., that the sum of £32,
 “ due to the *Hibernian Gas Light Company*, for gas
 “ supplied to the above concern, shall be paid within six
 “ months from the date hereof. And I also undertake
 “ that the future supply of gas to the above concern shall
 “ be discharged by me as it may become due, until you
 “ have further notice.” Now I shall take the rule of law upon this subject from one of the cases which have been referred to; for the rule itself is not differently stated in others. I read from the judgment of Chief Justice *Tindal*, in *Hawes v. Armstrong*(a):—“ It is not, however,
 “ necessary that the consideration should appear in *express*
 “ terms; it would undoubtedly be sufficient in any case if
 “ the memorandum were so framed that any person of
 “ ordinary capacity must infer from the perusal of it that
 “ such and no other was the consideration upon which the
 “ undertaking was given.” Now every word in this sentence is material, and must be fulfilled to the satisfaction of the Court in giving judgment for the plaintiffs

(a) 1 Scott, 761.

here. It is conceded that the mere promise of a third person to pay the debt of another, at any given time, does not of itself import a consideration of forbearance; but in this instance a great deal more appears on the instrument than a mere promise to pay the debt of a third person at a future time. It is averred in the declaration that the plaintiffs, having sold and delivered to *Luscombe and Mullen* a supply of gas for *Home's Hotel*, *Luscombe and Mullen* were found indebted to the plaintiffs in £32, to be paid by *Luscombe and Mullen* to the plaintiffs on request. It is then averred that the defendant *was receiver of Home's Hotel*; "receiver" is the only word used, but it is doing no violence to this word to call him the receiver of the monies and profits arising thence. Then, no doubt, it is stated that he, as receiver, gave an undertaking for the debt of General *Luscombe and Mullen*, with their sanction; and as it is admitted by the plea, and appears upon the instrument itself, that they had an interest in the hotel, we must take it that the defendant was the receiver of *Luscombe and Mullen*. That being so, he engages as receiver, and with their sanction, to pay for them the debt. Now, the import of that is, that they had authorised the defendant to appropriate so much of those funds to the use of the plaintiffs as would pay that amount. We may, then, suppose, as it has been put by counsel at the bar, that all parties were present at this agreement; and that *Luscombe and Mullen* had sanctioned the defendant appropriating the proceeds of the hotel to the payment of this demand within the six months. That being so, is not the contract for forbearance to be inferred? Is it substantially different from a bill drawn by the plaintiffs against the defendant, as receiver of *Mullen and Luscombe*,

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and accepted by the defendant? There would, then, have been, upon that bill, a binding contract for forbearance. And could the plaintiffs have sued the principal parties, *Luscombe* and *Mullen*, so long as this contract was in force? In my mind, it must be necessarily inferred that in the present transaction there was a contract for forbearance between the parties. I collect, then, by necessary inference from this document, that the owners had given their sanction to the defendant, and a right of appropriating the receipts of the hotel, within six months, to the discharge of the debt in question, and I cannot collect any consideration but that of forbearance. On those grounds we are of opinion that this contract does sufficiently import the consideration of forbearance alleged on the pleading, and, yielding implicitly to the doctrine, that a mere promise to pay the debt of another at a future day does not of itself import the consideration of forbearance, I think that the demurrer must be allowed. The observations I have made apply as well to the second set of counts as to the first.

PENNEFATHER, B.—As I understand this case, the instrument sets forth two promises; the first, a promise in consideration of forbearance to pay a past debt; the second, to pay for a future supply of gas as it shall be furnished. We think the difficulties, and the answers to those difficulties which apply to the first set of counts, apply to the second set of counts likewise. With regard to the promise in consideration of forbearance, the Lord Chief Baron has put it on the right grounds; and if we did not hold that a consideration of forbearance was to be inferred from the facts stated on this memorandum,

we should say that the plaintiffs had been guilty of a gross fraud, because it appears that the original debtors agreed to this arrangement; the word "sanction" can have no other meaning. The promise is an absolute promise to pay the debt, whether the defendant receives more or less; it is necessarily to be inferred that the consideration for that promise was the plaintiffs' forbearance.

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FOSTER, B., concurred.

RICHARDS, B.—I fully agree in the position, that a promise by a third person to pay the debt of another, at a future day, will not of itself import a consideration of forbearance, sufficient to maintain an action of assumpsit. But, without entrenching upon any of the authorities, I think we may here infer from the undertaking, upon which the present action is brought, a sufficient consideration to support the promise made by the defendant. Now what are the terms of the guarantee in this case? (Here his Lordship read the undertaking). It is, undoubtedly, competent to the plaintiff, regard being had to the terms in which this undertaking has been conceived, to show the relative situations of the parties thereto or referred to thereby; and this is stated in the declaration, and indeed very plainly referred to on the face of the contract itself. It appears then that Mr. Parry, as the receiver of *Home's* hotel, makes the agreement with the plaintiffs, and that *Luscombe* and *Mullen*, who were entitled to the proceeds of the hotel, as its proprietors, consent expressly to this agreement. We find *Mullen* and *Luscombe* parting with a portion of their property peculiarly applicable to pay this

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debt, and *Parry* making himself personally liable to pay it on certain terms. Now, surely, after *Parry* had thus agreed to make himself personally liable, it would have been a plain breach of faith if the *Gas Company*, before the six months had expired, were to have sued the parties primarily liable to the debt; yet it is contended by the defendant that these parties might have been sued the day after the undertaking was signed by *Parry*; that undertaking being, as he contends, purely inoperative. It is satisfactory, however, to know, though it may not be a ground for construing the agreement, that the *Gas Company* lay quiet during the six months; and neither sued *Luscombe* and *Mullen*, nor *Parry*. They therefore understood it to be a contract for forbearance; and such, it is plain, it was intended to be. I therefore think that the plaintiffs must succeed upon the first three counts of their declaration; as to the latter three counts (the 4th, 5th, & 6th,) I shall not add any thing to what has been said by the rest of the Court, the more especially as my attention has not been so particularly directed to that part of the case as to the argument raised upon the 1st, 2nd, & 3rd counts. But I concur in opinion that this demurrer should be allowed.

Demurrer allowed.

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action had been brought to recover damages for breach of covenant, and judgment had been obtained against the defendant on demurrer, in Trinity Term last, marked the 7th July. The defendant immediately afterwards lodged a writ of error, and served notice upon the plaintiff that he would attend at the Court-house at 11 o'clock, on the 29th August, before Baron Pennefather, sitting at the Leinster Circuit as judge of assize, to enter into the securities required by 1 Geo. IV. c. 68, sec. 8(a). The plaintiff's agent attended at Clonmel, on the 29th of August, and the two following days, to oppose the notice, but was then discharged from further attendance by Baron Pennefather, who said, that if the defendant should afterwards appear, he would not take his recognizance. The defendant afterwards served another similar notice to attend at Nenagh, to which the plaintiff paid no attention.

Where a defendant had lodged a writ of error, and served notice of entering into recognizances before a judge of assize, but did not attend to do so, the plaintiff who attended to oppose the notice cannot obtain, on motion, the costs of such ineffectual notice.

Geo. IV. c. 69, sect. 8. "And be it further enacted, that no execution shall be stayed by reason of any writ of error returnable into the Court, or by a supersedeas thereon, in any case whatsoever, unless the plaintiff in error, with two sufficient sureties, to be approved by the Court in which judgment shall have been given, or by a judge of such Court, shall be first bound by recognizance, in such Court, to satisfy the sum adjudged by such judgment, and also in two years of the lands, tenements, and hereditaments, if any, adjudged to be recovered thereby to satisfy and pay, if such judgment be affirmed, all and singular the debt, damages, and costs, adjudged by such judgment, and all costs to be awarded by or under the judgment in such writ of error, or on any further writ of error which may be afterwards brought in such case, returnable in parliament, and also the same rates of such lands, tenements, and hereditaments (if any) as shall be adjudged in any action that may be brought for that purpose.

1841. No bail in error was perfected; execution issued, and the
 MIDDLETON defendant's goods were sold for the amount of the
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Hobart, for the plaintiff, moved that the defendant's attorney should be ordered to pay to the plaintiff the costs of his attendance at *Clonmel*. This is like the case of perfecting bail, in which it is the practice to grant the costs of a notice to the opposite party if the bail be not perfected(a.) [BRADY, C. B.—What has become of the writ of error?] They may go on with it: it is no *superseas* unless bail in error be perfected. [PENNEFATHER, B.—Assimilating this to the case of bail, the Court never gives costs of a former ineffectual notice of bail; but when the defendant comes again to perfect bail he is refused, unless the costs of the former notice be paid.]

Per Curiam.—These are costs in the Court of Error. We cannot allow you them.

Refused, without costs.

(a) See 1 Arch. Prac. 603.

MALLET v. DOOLIN.

1841.
EXCHEQUER
OF PLEAS.
Mon. Nov. 22.

It is ordered by the plaintiffs, Messrs. *John and Robert* to recover the amount of several bills of exchange and other demands. The defendant appeared to the Court on the 5th November instant: on the 9th November the defendant lodged the sum of £31 in Court, under the rule:—

That the defendant should pay to the plaintiffs the sum of £31 with the officer in satisfaction of the plaintiffs' debt and costs hitherto, and plaintiffs to deliver up the sum at their peril.

GALLWEY and CONNOR."

And, pursuant to the above rule, the sum of £31 was paid on the 9th day of November, 1841.

J. FARRAN."

The plaintiffs' attorney was served with a copy of this order on the 9th of November, and on the 11th served the defendant to draw the money. The defendant's attorney swore on the 11th November he endorsed on the order a copy to the plaintiffs' attorney to draw the money, and on the 11th the plaintiffs' attorney then served the defendant with a declaration filed, and a bill of particulars; the defendant subsequently returned the order to the plaintiffs' attorney without having drawn the money, stating that he could not draw it without prejudice to

Where a defendant after appearance, and before declaration, lodged a sum of money "in full for debt and costs hitherto," and the plaintiff wished to draw the money, but feared to do so, lest his doing so should operate as a discontinuance of the action, and afterwards filed a declaration, and applied to vacate the rule for lodgment, and that the money should be lodged under the thirty-fourth General Rule. *Held*, that the lodgment in this way, being before declaration filed, was regular.

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his right to continue the action. The plaintiffs' attorney swore, that being desirous of taking out the money so paid into Court, and of proceeding with the action for further damages, he was advised, that by doing so, he should not receive any costs; accordingly, on the 12th November instant, he served a notice on the defendant's attorney calling on him to vacate the foregoing rule as irregular, and to pay the money into Court under a proper rule, offering to sign any consent for that purpose. On the 18th November he served notice of a motion for that purpose, pursuant to which,

B. Stephens, for the plaintiff, now moved that the aforesaid rule should be vacated, as not being in accordance with the 34th general rule(a).

[PENNEFATHER, B.—In the present case the money was lodged when there was no declaration filed; the costs were marked on the back of the writ, and were easily ascertainable; but after the declaration has been filed it is different, and where the lodgment is made as it is here, they leave you to ascertain how much is due for debt and how much for costs.]

Hutton, for the defendant.—This application is founded on a misapprehension of the general rule. The defendant may either lodge a sum of money for debt and costs, under the ancient practice, or he may lodge a sum for the debt

(a) "On payment of money into Court, the defendant shall undertake, by the rule, to pay the costs; and, in case of non-payment, to suffer the plaintiff on taking the money out, either to move for an attachment on a proper demand and service of the rule, or to sign final judgment for nominal damages."—*Yeo's N. R.* p. 54.

and give an undertaking for the costs under the 34th general rule; *Yeo and Billing's* Prac. 168. This is only an irregularity which the plaintiffs have waived: they served notice of their intention to draw the money, and the defendant's attorney signed a consent for that purpose on the 11th November, and afterwards the plaintiffs filed their declaration; so that by the 24th general rule(a) they are now disentitled to set our proceedings aside, having taken a subsequent step themselves after having had notice of the irregularity.

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Stephens referred to 1 *How. Ex. Pleas Side*, 133. The costs here are unascertained: if we tax the costs it will be a discontinuance of the action.

[PENNEFATHER, B.—The practice in this Court has been as contended for by Mr. *Hutton's* client.]

BRADY, C. B.—It is quite admitted, and is reported to us by the officer, that before the new rules this practice of lodging money prevailed. If the plaintiff was willing to take it out he might do so, and discontinue the action; if he did not choose to do so the case went on, and after verdict, the taxing officer taxed the costs up to the period of the lodgment, and deducted them from the amount lodged; and if the plaintiff did not recover more than the balance, the defendant had then a lien on the sum in Court for the costs incurred by the proceedings subsequent to the lodgment. The new rule applies in terms to a lodgment

(a) "No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after the knowledge of the irregularity." *Yeo. N. R.* 38.

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made after a declaration has been filed ; and it is reported to us that the new rule is so considered to apply to a lodgment made after declaration filed, and that the *old* rule still continues as to a lodgment made before declaration filed. We must therefore hold this lodgment to have been made conformably to the ancient practice, and will make no rule on this motion. The matter is now under the consideration of the judges, and a general rule on the subject will probably be made before the first day of next term.

No rule.

The following Rule was afterwards made :—

GENERAL RULE.

Michaelmas Term, 1841.

IT IS ORDERED that the general rule of Hilary Term, 1832, and of the 1st February, 1834, so far as the same relate respectively to the payment of money into Court, and to the matters to be done thereupon by the plaintiff or defendant, in the action or actions, in which such payment may be made, shall, until further order, extend and apply to the payment into Court of any money by way of compensation or amends, under the powers given by the 46th section of an act passed in the 3d & 4th years of the reign of her present Majesty, entitled “ An act for abolishing “ arrest on mesne process in civil actions

in certain cases ; for extending the remedies
 “ of creditors against the property of debtors
 “ and for the further amendment of the law
 “ and the better advancement of justice in
 “ Ireland.” And that the payment of such
 money by way of compensation or amends
 shall accordingly be made in such manner,
 and under such regulations, as to the pay-
 ment of costs and the form of pleadings as
 prescribed by the aforesaid General Rules,
 in respect to the payment of money into
 Court(a).

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prior to the statute 3 & 4 Vic. c. 105, sec. 46, and the general
 the Courts above stated, the rule was—“ That where the sum
 ed was a sum certain, or capable of being made certain by mere
 ation, without leaving any other sort of discretion to be exer-
 the jury, the defendant might pay money into Court, *Hallett v.*
India Co. 2 Bur. 1120, *Hodges v. Lord Litchfield*, 9 Bing. 713.
 assumpsit, where the breach was substantially the non-payment
 y, *Gregg's* case, 2 Salk. 596, but not otherwise, *Hatton v. Bolton*,
 ack, 299(n), money might have been paid into Court ; so, in debt
 le contract, *McQuillan v. Cox*, 1 H. Black, 249, debt for rent,
 icy of insurance, or for non-residence, *Gregg's* case, *ubi sup* ; so,
 ant, where the breach assigned was merely the non-payment of a
 money, but not in other cases, e. g. an action for dilapidation, or
 repair, *Gregg's* case, *ub sup.* *Salt v. Salt*, 8 T. R. 47 ; but in
 ions, as sounded in damages unliquidated in their nature, for in-
 respass for assault and battery, or for mesne rates, it was not com-
 or the tenant to pay money into Court, on the chance of a jury
 with his estimate of the injury sustained by the plaintiff. But
 4 Vic. c. 105, sec. 46, has now extended the right of payment
 t to all personal actions, unless those specially excepted. The
 is are rather too numerous ; as actions for assault and battery,
 risonment, libel, slander, and malicious arrest, are precisely the
 1 which such a power would be most desirable. These actions are
 uently brought for the mere purpose of obtaining costs, and
 dictive motives ; and it would appear only just, as well as poli-
 low erring, but penitent defendants, to protect themselves from

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a heavy mulct in costs by a timely payment into Court of sufficient amends.

We shall now briefly consider the mode of paying money into Court, the proceedings consequent, and the effect of such payment.

No special application is necessary to entitle the defendant to pay money into Court, either under the old practice or under the recent statute; but he may do so by entering a rule in the proper office, and giving the undertaking required by G. R. 34, if *after* declaration filed. On bringing this rule to the clerk of the pleas, he will receive the money and give a receipt for it. The rule, or a copy of it, should then be served on the plaintiff's attorney. If the payment be *before* declaration the undertaking is not necessary, but a sum may be paid in to cover the amount of the taxed costs, or as it appears from the principal action, a gross sum for the two, *Barton v. Crawford*, Batt. 334.

If the plaintiff accept the sum lodged in discharge of the action, he, or his attorney may, on giving a proper receipt to the clerk of the pleas, receive the money, and then tax his costs in the usual manner, and after apply for an attachment, or sign judgment for nominal damages. If the plaintiff does not intend to accept the sum lodged as in discharge of the action, he may however take it out of Court, though the former practice was otherwise, Batt. 338, and the practice was (quere if not so still, *Green v. Coughlan*, 1 Jones, 283, *Willie v. Barron*, Hayes, 41) to impound it, to answer the defendant's costs if he should obtain a verdict; but if the plaintiff, in such a case, draws the money, he cannot enforce payment of his costs until the result of the action is decided.

As to the legal effect of payment of money into Court as an admission of the cause of action stated in the declaration, the rule now is settled, that where money is paid into Court upon the general *indebitatus* counts, the payment only amounts to an admission that the defendant (or defendants) is (or are) liable in respect of *some* contract to the amount so paid in; and that where the plaintiff declares upon a special contract, it is an admission of the existence of the contract and of the breach, but not of its amount, *Archer v. English*, 1 M. & Granger, 875. If there be two or more defendants, payment into Court, if the action be general in its frame, admits a joint liability on *some* cause of action, not necessarily on that relied on by plaintiff. If the declaration be special the cause of action is admitted. The reasons of these distinctions are clear. The general *indebitatus* counts admit of great latitude in proof; and where no notice is given of the particular ground of complaint, it would be absurd to hold payment into Court to be an admission of the particular contract offered in evidence, as well as of a general liability. When on the contrary a special contract is declared on, that gives full notice of the particular cause of complaint; it cannot be varied from in proof, and therefore payment into Court can only be referred to the one state of facts specially set forth. Briefly, in the first instance, it is an admission of a contract (e. g. of money lent, but not when or to whom; of goods bought, but not of the time, kind, or amount, &c.); in the latter it admits the contract, *Bingham v. Robins*, 5 M. & W. 94; *Archer v. English*, supra. Some few instances of these effects of payment may be stated; if money be paid into Court on a count on a bill of exchange,

defendant's handwriting, &c. is admitted, *Gutteridge v. Smith*, 2 Black, 374, and the sufficiency of the stamp, *Israel v. Benjamin*, 3 M. & C. 40; so, if paid in an action of covenant the execution of the deed is admitted, *Randal v. Lynch*, 2 Camp. 357; so if paid in on a count on a promise it admits an agreement signed according to the statute of 1832, *Middleton v. Brewer*, Peake 15; in an action for use and occupation it admits the plaintiff's title, and the contract estops the defendant from relying on a defect in plaintiff's title on the plaintiff's own evidence, *Dolby v. Hles*, 3 P. & D. 287. The earlier cases as to the effect of payment into Court, as an admission of a cause of action stated generally, must now be considered as qualified, and the defendant may show to the plaintiff, for any legal reason, should not recover on the count offered in evidence, *Jones v. Read*, 1 Nev. & P. 18, *Shearwood v. 5 A. & E.* 383, *Wills v. Langridge*, id., *Lucy v. Walrond*, 3 Scott, in special contracts the Court will, under particular circumstances and, allow the defendant to give evidence of it, notwithstanding admission by payment into Court. The prudence of confining the payment into Court to some particular counts, or to part of them will result from the preceding observations:—The legal effect as an admission of payment of money into Court is not affected by the practice peculiar to England of pleading such payment, the doctrine was discussed and settled, nearly as it now stands, long anterior to such a practice. Applying these distinctions to those actions in which, for the first time, payment into Court is permitted by the recent statute and rule, it would appear that in all actions so general in their form, that no specific notice is given to the defendant, such as in trespass, trover, &c.; payment into Court will only admit a general liability—the particular liability admitted on by the plaintiff may be controverted, and in those actions which require full information of the facts which constitute the right of action, payment will amount to an explicit admission of these facts, and of the breach and of the amount of damages resulting from the breach assigned. Formerly it was considered that after payment of money into Court the plaintiff could not be nonsuited: but since, by the terms of the rule of 1832, the sum paid in is to be considered as struck out of the declaration, and the plaintiff is not allowed to give evidence of it, it is clear he may be nonsuited, as in other cases: in this country, it is, in fact, a special traverse of the amount of damages; in England it is not, as the payment must be pleaded and damages ultra replied, and therefore there may be a nonsuit. As the striking out of the declaration the money paid into Court has been virtual merely, and the fact does not appear on the record, the plaintiff should be prepared to produce an office copy of the rule of Court: this will be sufficient evidence of payment and admission by the defendant. If the jury do not believe the plaintiff with larger damages than the sum paid in, their verdict will, in the result, be a verdict for the defendant: *Murdock v. 13 M. & N.* 53; *Green v. Coughlan*, 1 Jones, 283; and if he offers the rule of Court in evidence, the proper direction would seem to be to say, "you think the plaintiff has sustained no greater damages than the sum paid in, your verdict will be for the defendant, if greater, for the plaintiff, in the amount you think he has sustained." Money once lodged in Court

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by the defendant, can *never*, it is said, be taken out by him or his representatives, unless the cause has abated by death; but the Court may, if it has not been paid out to the plaintiff, impound it to answer the defendant's costs, *Green v. Coughlan*, 1 Jones, 283." As to payment into Court, in ejectment for non-payment of rent, vid. 3 Ir. L. R. 217.

1841.
 EXCHEQUER
 OF PLEAS.
 Tues. Nov. 24.

FARRELL v. DONNELLY

In debt for double rent under 15 Geo. II. c. 8, the declaration must allege the notice by the tenant of his intention to quit the premises to have been given in *writing*.

DEBT for double rent, under 15 Geo. II. c. 8, by a landlord against a tenant, who had given notice to quit the premises held by him, and had not delivered up the possession thereof at the time specified in such notice. The declaration did not allege the notice to have been in *writing*.

General demurrer.

O. Sproule, for the demurrer. The 15 Geo. II. c. 8, s. 9, requires that the notice by the tenant of his intention to quit the premises holden by him should be in *writing*. The *English Act*, 11 Geo. II. c. 19, s. 18, to which the Irish Act corresponds, does not require the notice to be in writing, and the pleader, following the precedents on that statute, has fallen into the present error.

The case was not argued for the plaintiff.

Demurrer allowed.

Macdonough, a short time after came into Court, and

asked leave to amend; he said he had intended applying when the case was called on, but was arguing in another Court.

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FARRELL
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Leave granted, on payment of costs.

SPENCE v. FINN.

1841.
EXCHEQUER
OF PLEAS.
Wed. Nov. 24.

THIS was an action of covenant, brought by *William Duckett Spence* and *Robert Spencer Knox*, executors of the *Rev. Robert Spence*, deceased, to recover certain arrears of which accrued due to the testator in his lifetime. The copy of the writ served must correspond with the original in sound and sense.

the *capias ad respondendum* which issued in this case, the parties were rightly named, "*William Duckett Spence* and *Robert Spencer Knox*, executors of the *Rev. Robert Spence*, deceased, plaintiffs;" but in the copy of that writ served upon the defendant(a) the first plaintiff was named

(a) 43 Geo. III. c. 53, sect. 3, enacts—"That from and after the next day of the said *Michaelmas Term*, 1803, no person shall be held to special bail upon any process issuing out of his said Majesty's said Court of King's Bench, Common Pleas, or Exchequer, in that part of the said United Kingdom, called *Ireland*, where the cause of action shall not amount to the sum of £10 or upwards, nor out of any inferior Court, where the cause of action shall not amount to the sum of forty shillings, upwards; and that in all cases where the cause of action shall not amount to the sum of £10 or upwards, in any of the said superior Courts, or to forty shillings or upwards in any such inferior Courts, (and the plaintiff or plaintiffs shall proceed by way of process against the person), he, she, or they shall not arrest or cause to be arrested the body of the defendant or defendants, but shall serve him, her, or them personally with a copy of the process; and if such defendant or defendants shall not appear at the return of the process, or within eight days after

On the 12th November, 1841, the plaintiffs' served a notice on the defendant's attorney, calling him to enter a proper appearance for the defendant inasmuch as he did not, in the appearance entered set out the plaintiffs' names, and the capacity they sued, properly, and in the notice of appearance inserted a wrong plaintiff, and apprising him that if no appearance was not entered, the plaintiff would obtain a parliamentary appearance for the defendant. On the 13th November the defendant's attorney replied, on the 14th November, that the appearance and notice were being in accordance with the copy of the writ served on the defendant, and cautioning the plaintiff against a parliamentary appearance. On the same day (

such return, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made and filed in the presence of the personal service of such process as aforesaid, (which shall be filed *gratis*), to enter a common appearance, or file a writ of habeas corpus for the defendant or defendants, and to proceed thereon as if the defendant or defendants had entered his, her, or their appearance on common bail; any law or usage to the contrary notwithstanding.

Sec. 6 enacts—"That upon every copy of such process served upon any defendant, shall be written a notice to such defendant of the intent and meaning of such service, to the effect following to wit:—

"A. B. you are served with this process, to the intent that

aration was filed, in which, as in the writ itself, the ntiffs were rightly named, and notice of this declaration served. On the 20th November the defendant served ervice, entitled as in the copy of the writ, of a motion to ate the declaration filed on the 15th November against defendant, in which *William Duckett Spence* and *Robert ncer Knox*, executors of the Rev. *Robert Spence*, were ntiffs. On the 23rd November the plaintiff served ice, entitled as the writ itself, of a motion to amend appearance entered for the defendant at the suit of *William Duckett* and *Robert Spencer Knox*, executors the Rev. *Robert Spence*, in accordance with the writ *ex. resp.*, by naming the plaintiffs correctly, as at the d of this notice. The plaintiffs' attorney swore that misnomer occurred through a clerical error, and that was convinced the defendant would have rectified the earance in this cause, as he had set right two other earances in two other causes in which he had appeared gularly for other defendants at the plaintiff's suit. e two motions came on together.

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Brewster, Q.C., moved to set aside the declaration. ie Court may have a power to alter writs of process, t the copy is made at the peril of the party who makes 43 Geo. III. c. 53, s. 3, 6; *Byfield v. Street*(a). RADY, C. B.—There is another stronger case—*Nicol Boyn*](b). It has frequently been decided that any fect in the notice at foot of the copy of the writ of ocess required by the 6th section will vitiate it; *a tiori*, the copy must be vitiated by any defect in the dy of it.

(a) 10 Bing. 28.

(b) *Ib.* 339.

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Molyneux and James, for the plaintiffs, referred to *Baker v. Neaver(a)*, and the note to *Gainer v. Weller(b)*, *Gardner v. Walker(c)*. The provisos of the statute 43 Geo. III. c. 53, are only applicable to parliamentary appearances; and the modern *English* cases are all upon the act for uniformity of process(*d*), in which the judges have resolved not to allow an amendment except to ~~are~~ the statute of limitations, or to correct clerical errors.

Per Curiam.—The cases cited, though they arose on the *English* act for uniformity of process, which requires a literal copy of the writ to be served on the defendant, were, nevertheless, decided on general principles, to which we must adhere. The Court in these cases has held that a discrepancy between the copy and the writ is fatal if it alter the sense, whether the alteration be in a material point or not. We cannot otherwise draw a satisfactory line of distinction. We think the copy must be deemed insufficient. It is better to adhere to the strict words of the act of parliament, than to allow it to be frittered away by minute distinctions. Here the surname of one of the executors is mistaken; and it is advisable to hold that if the sense or the sound be altered, the variance is fatal. We must, therefore, refuse the defendant's motion, with costs of one motion to be taxed on all the documents; and allow the declaration to stand, the defendant undertaking to enter a regular appearance, the rules to plead being served *de novo*, and the plaintiffs paying the costs(*e*).

(a) 1 Cr. & Mee. 112.

(b) 11 Moo. 450.

(c) 3 Anst. 935.

(d) 2 Will. IV. c. 39.

(e) Vide *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 504; *Smart v. Johnson*, 3 Mee. & W. 69; *Cooke v. Vaughan*, 4 Mee. & W. 69; 6 Dow. P. C. 695, S. C. *Quilters v. Neelby*, 4 Jur. 1186.

HUNT v. BATEMAN.

1841.

EQUITY
EXCHEQUER.
Fri. Dec. 3.

as a suit brought by the assignee of a judgment, In a creditor's
e death of the conusor. The bill prayed an suit, the heir
and sale of certain lands affected by the judgment. at law of the
debtor, who
has been de-
creed his costs
out of the sur-
plus fund, can-
not have them
against the
plaintiff if the
fund prove
insufficient.

Brooke Bateman, the heir at law of the conusor,
1 brought before the Court as a defendant, and by
er admitted the statement of the bill, and claimed
est in the lands; on the final hearing of this cause
een decreed his costs out of the surplus fund,
yment of the plaintiff's demand; the fund proved
ent, and Mr. *Workman* applied that he should be
his costs against the plaintiff. He cited *Hatchell*
Cremorne(a).

tr(b).—The rule of this Court has never been that
at law in such a case as this, when the fund proves
ent, can have his costs against a creditor. The
ed has not been followed in this Court.

1841.

EQUITY
EXCHEQUER.
Sat. Dec. 4.

EVANS v. NORCOTT.

Application on behalf of a landlord to eject for his rent, which a receiver over the premises had refused to pay.

Ordered, that the landlord should be at liberty to eject if the receiver did not pay the demand on or before the 1st January next. The costs of this motion to be paid by the receiver, if he should pay the rent, without prejudice to his being disallowed them, if this motion were made necessary by his misconduct.

MR. *W. C. Dobbs*, on behalf of the landlord of the land, the subject matter of this cause, applied that he might be allowed to bring an ejectment against the tenants of these lands, the amount of a year's rent being already due. A receiver had been appointed, to whom application had been made by the landlord for payment of this demand, who had refused to pay it.

COURT.—Let the landlord be at liberty to bring his ejectment, unless the receiver pay the rent on or before the 1st of January next, the receiver being served with this order within a week. If the receiver pay the money, he must also pay the costs of this motion, and let his doing so be without prejudice to the remembrancer considering in the office whether the receiver should be allowed these costs or not in passing his account, for it was the receiver's first duty to pay this demand of the landlord, if properly made.

SCOTT v. KNOX.

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THOMAS KNOX, in the year 1727, was absolutely possessed of the then residue of a term of 1,000 years, created in , of the lands of *North Tyrella*. Previously to 1776, *John Knox* bequeathed his estate in these lands to his son, *John Knox*, charged with an annuity of £182 per annum, payable to his daughter, *Mary Knox*, her executors, administrators, and assigns. By indenture of mortgage, dated 3d July, 1776, reciting that the said lands of *North Tyrella* were subject to the annuity of £182, *John Knox* conveyed these lands, together with the lands of *Ardmillan*, which he held for a term of years under the see of *Down* and *Connor*, and together with certain other lands subject to certain charges, to *Jane* and *Mary Knox*, to secure the payment of a sum of £800. In the year 1784 *John Knox* purchased the reversion in fee, expectant upon the term of 99 years, in the lands of *North Tyrella*, for a sum of £1,000. In 1785 *John Knox* conveyed the equity of redemption in the lands of *Ardmillan*, already mortgaged to *Jane* and *Mary Knox*, to the Hon. *Thomas Knox* and *Waddell* of *Widdowham*, their heirs, executors, and administrators, as

K. died in 1791, possessed of an equity of redemption in the lands of A., held for a term of years under the see of *Down*, and left two sons, H. W. K. and T. K. H. W. K. thereupon entered into possession of the lands of A. and obtained renewals of the lease thereof in his own name; he also executed mortgages thereof, applied the rents thereof in discharge of some of his father's debts, and acted as sole owner thereof, until his death in 1809. He obtained letters of administration to his father in 1802. No claim was

made by T. K. during the life of H. W. K. to these lands. It was held, that such possession was not adverse against T. K., and did not establish a title to the entire lands, as against the representatives of T. K., who were entitled to the equity thereof.

John Knox, being possessed of a term of 1,000 years in the lands of T., bequeathed it to K., and with an annuity of £182 for M. K. conveyed the lands in mortgage, subject to the annuity, and afterwards purchased the fee in these lands. There was no declaration of trust that the term should attend the inheritance.

It was held, that the term, though mortgaged, became attendant upon the inheritance, and that there was no express declaration to that effect.

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trustees, to secure the payment of £5,000 to Lord Wells. In 1791, *John Knox* died intestate, leaving two sons, *Henry Waring Knox* and *Thomas Knox*. *Henry Waring Knox*, the elder son, on the death of his father, entered into possession of the entire of the *Ardmillan* estate. On the 22d April, 1799, *Henry Waring Knox* executed a further mortgage of the lands of *North Tyrella* to *Sarah Agnew*, for a term of years. On the 18th December, 1801, *Henry Waring Knox* executed a further mortgage of the *Ardmillan* estate to *Benjamin Moreland*. On the 18th September, 1802, *Sarah Agnew*, the mortgagee of the lands of *North Tyrella*, being then dead, her executors assigned the mortgage of 22nd April, 1799, to *Robert Scott*. On the 23rd September, 1802, *Jane Knox*, being then the survivor of the two mortgagees of the mortgage of 3rd July, 1776, released the lands of *North Tyrella* from the operation of the mortgage deed of that date. On the 19th November, 1802, *Henry Waring Knox* assigned the equity of redemption in *North Tyrella* to a person named *Bradshaw*, as a trustee for *Robert Scott*, subject, however, to the annuity of £182, recited in the mortgage of 3rd July, 1776. *Thomas Knox*, the second son of *John Knox*, died in 1805, having appointed the Hon. *Thomas Knox* and *Pascoe Grenfell*, Esq., his executors, the former of whom renounced probate of the will.

In 1807, the original bill in this cause was filed against *Henry Waring Knox* and others, by the executors of *Robert Scott*, for a foreclosure of certain mortgages, by virtue of which *Henry Waring Knox* was indebted to *Robert Scott* in the amount of £22,000; all of which mortgages, except one, affected the lands of *Maherally*, held by *Henry Waring Knox*, under the see of *Dromore*, and that one affected the

millan estate alone. There were also judgment debts *Henry Waring Knox* which affected his estates generally.

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bill prayed a sale of all the estates subject to the plaintiff's demands, for payment of them, and the other debts of *Henry Waring Knox*. In 1809, *Henry Waring* died, and *Owen Williams* became his administrator.

cause was not brought to a hearing until 1814, when, on the 28th April, a decree was made, whereby it was ordered to the officer to take an account of the sums due to the persons brought before the Court as special creditors of the different parts of the estate, and what was due to the plaintiffs on foot of their several mortgages. On the 9th July, 1815, the officer reported; and on the 20th June 1816, a final decree was pronounced, directing a sale of the *Maherally* and *Ardmillan* estates, in default of payment within the usual time of the several sums reported due.

Maherally estate had been sold for a sum of £34,165, which had been disposed of under an order of the Court, where there was now no question touching the proceeds of the estate. The *Ardmillan* estate had been sold to a Mr. *Anderson*, on whose behalf objections were taken to the sale, that there was no personal representative of *John Knox* before the Court; and that as one of the unsatisfied mortgages affecting *Ardmillan* was that made by *John Knox* senior and *Mary Knox*, and as the estate was sold for payment of the incumbrances, it was necessary they should be parties to the cause. Another objection was, that on the death of *John Knox* the *Ardmillan* estate went to his sons, *Henry Waring Knox* and *Thomas Knox*; also, *Thomas Knox* having died, leaving children, they were entitled to their father's rights, or, at all events, the moiety of the estate should be represented. It was insisted, on behalf of the plaintiff, that it was not

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necessary to make the children of *Thomas Knox* defendants, for though *Ardmillan* was a chattel interest, and as such would go to the next of kin of *Thomas Knox*, yet that, under the circumstances, the whole estate became vested in *Henry Waring Knox*, because he entered into possession thereof on his father's death, and that he had in effect become the purchaser of the other moiety of the *Ardmillan* estate, by having paid off his father's debts to an extent which covered the value of that moiety. They insisted farther, that there was no claim made by *Thomas Knox* against his father's estate, and that he had never questioned the right of his brother.

There was some difficulty in finding a personal representative for *John Knox* after the death of *Henry Waring Knox*; but administration to *John Knox* having been at length granted to *Emma Lady Campbell*, she was made defendant in the cause by a supplemental bill, filed on the 28th December, 1818. *Lady Campbell* and her husband answered this bill in 1819, and by their answer set up the claim of the children of *Thomas Knox*, (then minors,) to one moiety of the lands of *Ardmillan*, as next of kin to *John Knox*. These children answered by their mother, and insisted on the same defence. The administrations granted to *Lady Campbell* and to *Owen Williams* were administrations *pendente minoritate* of the minor children of *Thomas Knox*. A few days before the hearing of the supplemental cause, in July, 1821, *Henry Williams Knox*, the eldest of the children of *Thomas Knox*, came of age, and then the administrations fell to the ground. A decree to account was, however, made in that cause on 6th July, 1821. *Henry Williams Knox*, on his coming of age, took out administration *de bonis non* to his uncle, *Henry Waring*

Knox, and to his grandfather, *John Knox*. On the 8th November, 1821, a supplemental bill was filed by the plaintiffs, to bring *Henry Williams Knox* before the Court, praying to have the benefit of the former proceedings against him in his new capacity as representative and as a party being beneficially interested in his suit. On the 2nd March, 1822, *Henry Williams Knox* answered the supplemental bill, and set up in his answer the same defence he had made when a minor. On the 2nd July, 1822, the cause was further heard against him; and it was decreed that the plaintiffs should have the benefit of the decree of the 6th July, 1821; that the same should be carried into specific execution; and the plaintiffs' mortgage be declared a charge as in the former decree, and the same accounts be taken as in the former decree. In September, 1823, administration was for the first time granted of the effects of *Thomas Knox* to *Owen Williams*, and in the same year administration of *John Knox*, the grandfather, and of *Henry Waring Knox*, was granted to *Emma Knox*, the sister of *Henry Williams Knox*, who afterwards became the wife of *Henry Currie*. On the 20th February, 1826, the cause was again heard, and a decree was made that the bill should be taken as confessed against the defendants, *Laura Maria Rouille*, and *Peter Maria Rouille*, her husband, and that the decrees of 6th July, 1821, and 2nd July, 1822, should be carried into execution against *Emma Currie* (who was then of age) and her husband. Under this decree, a creditor of *Henry Waring Knox*, named *Thompson*, filed his charge, and alleged the title of *Henry Waring Knox* to the whole of *Ardmillan*. In July, 1826, *Owen Williams*, as the personal representative of *Thomas Knox*, filed a discharge to *Thompson's* charge, alleging that

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Thomas Knox was entitled to one moiety of *Ardmillan*, and stating that though *Henry Waring Knox* paid the debts of his father to a considerable amount, yet he had got possession of certain lands of his father, namely, *Tyrella*, which he had sold, and that the sale of that property formed part of the fund by which *Henry Waring Knox* had paid off the debts of his father. A report was made under the decree of 1826, to which twelve exceptions were taken for the defendant, *Emma Currie*. The case having again come before the Court on these exceptions, the Court ordered that they should be set aside, with liberty to substitute other exceptions, breaking the first exception into four, and substituting a fifth exception for the second. The exceptions were thirteen in number; the principal, and the points upon which they were decided, are fully stated in the judgment of the Lord Chief Baron.

Mr. *Pennefather*, Q. C., Mr. *Warren*, Q. C., Mr. *Scott*, Q. C., and Mr. *Blake*, for the plaintiff.

The *Attorney-General*, Mr. *Wm. Brooke*, Q. C., Mr. *Holmes*, and Mr. *Stearne B. Miller*, for the defendant.

This case was argued upon several days during this and the preceding term; and the judgment of the Court was finally pronounced in the sittings after this term.

BRADY, C. B.—This case comes before the Court on an exception to the officer's report, called the 5th original exception, relating to the lands of *Ardmillan*; and on a special point submitted by the officer to the Court in connection with the third original exception relating to the lands of *North Tyrella*. The question as to *Ardmillan* is,

whether it had become the sole property of *Henry Waring Knox*; and as to *Tyrella*, is, whether at the death of *John Knox* it was part of his personal property; or whether, on the facts I shall hereafter state, it descended to his heir at law, *Henry Waring Knox*. The plaintiffs now before the Court are the general creditors of *Henry Waring Knox*: they contend that *Ardmillan* had become the sole property of *Henry Waring Knox*, and that *Tyrella* was a freehold. The defendants are the representatives of *Thomas Knox*, the brother of *Henry Waring Knox*; they contend that as to one moiety of *Ardmillan*, *Henry Waring Knox* was, and continued to be, a trustee of *Thomas Knox*, and that *Tyrella* was part of the personal assets of *John Knox*; and therefore that as to a moiety of this also, *Henry Waring Knox* was a trustee for his brother, upon the facts I shall hereafter state. *Ardmillan* is a leasehold, held under the See of *Down* and *Connor* by *John Knox*, which he mortgaged with other lands to *Jane* and *Mary Knox*, by an indenture dated in 1775, for the sum of £5,000, which mortgage remains still unsatisfied. By another deed dated in 1785, he conveyed the same property to the Hon. *Thomas Knox* and *Waddell Conyngham* (who appears to have been the confidential agent of the family) as trustee, to secure the payment of £5,000 to Lord *Wells*. *John Knox* died intestate, leaving two sons, *Henry Waring Knox* and *Thomas Knox*. At his death *Ardmillan* was confessedly part of his personal property, subject to the mortgage, and as such belonged to his sons in equal moieties. *Henry Waring Knox* died in 1809; and the officer having been directed to report as to his personal property has found as follows:—"I find that the said *Henry Waring Knox*, after his said father's death, to whose

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personal estate he subsequently, that is to say on the 13th November, 1802, obtained letters of administration, entered into exclusive possession and receipt of the said lands called the *Ardmillan* estate, and obtained several renewals of the lease thereof in his own name, and paid fines for such renewals, and executed several mortgages thereof for debts contracted by him, and applied the rent and profits thereof and other monies belonging to him in discharge of the said debts due by the said *John Knox*; (the particulars of which are stated in the 1st schedule annexed hereto); and, again, he says—"I find that the said *Henry Waring Knox* so acted as the sole owner of the said chattel interest in the lands called the *Ardmillan* estates without any claim on the part of his brother *Thomas Knox*, or any of the next of kin of *John Knox*, to any portion of the interest therein; and that such estate was of the yearly value of £638 at the time of *John Knox's* death, and that a mortgage thereof by the said *Henry Waring Knox* to *Benjamin Moreland*, of *Abingdon*, in *England*, was made on the 18th of December, 1801, to secure a sum of £2,000, and which mortgage was an additional security for said sum with a certain bond, dated 10th December, 1801, executed by the said *Henry Waring Knox* and Colonel *Thomas Knox* to the said *Benjamin Moreland*, which said mortgage debt was afterwards assigned by deed, dated in 1828, to *Owen Williams* by the said *Benjamin Moreland*." The report then finds that *Henry Waring Knox*, in 1802 obtained letters of administration to his father, and continued to act as the sole owner of the property till 1809, when he died; and under those circumstances, and as it did not appear that any claim was made during his lifetime, the officer finds that the said equity of redemption formed part of the personal property of the said *Henry Waring Knox*.

In substance we are called on to say that *Henry Waring Knox* became absolute owner of *Thomas Knox's* moiety. It is necessary to see if we can discover any grounds for such a conclusion. It struck the Court early in the argument, that if it were to come to that conclusion, it might be on the supposition of an agreement between the brothers. There is no finding that any such agreement existed; and, independently of the objection in point of form to such a proposition, there is no evidence pointed to any document or arrangement to that effect. Another mode was suggested in which a person circumstanced as *Henry Waring Knox*, might have acquired an absolute title: it was one for some time strongly urged, viz., by paying off debts exceeding in amount the value of the moiety of the property. I will not examine the authorities cited: the general doctrine is one open to strong observation as to its practical consequences: it has, however, been abandoned, the report not containing a sufficient statement to enable us to say that such was the case, and further inquiry being declined. The supposition then of agreement, and the ground of payment of debts having been displaced, no ground remains except lapse of time or acquiescence. On this part of the case it is to be observed that the question is to length of time generally, both at law and in equity, arises by way of defence to the claim of a party sought to be barred by it; but in this case it is put forward by the plaintiffs, who call upon the Court to establish their title against dormant claims, and to aid them in depriving the rightful owners of their property. Perhaps the proper answer might be, that the Court would not give such assistance: that, as it would not aid those who allowed the

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ownership to remain so long unquestioned, so its assistance would be refused to relieve those in possession from that claim, still resting on a title originally wrong, but that it would rest content to leave matters as they were without lending its assistance to either party. I can imagine a case wherein the Court would refuse it; but in the form in which this case has come before us we are called on to pronounce affirmatively one way or another: still it lies on the plaintiffs to show to the satisfaction of the Court that this property of *Thomas Knox* had become theirs by lapse of time, and this will depend on the character of the possession of *Henry Waring Knox*. Is there any evidence that it was adverse? I think not. Direct evidence of exclusion there is none—none of any claim of title on the part of *Henry Waring Knox*, independent of his possession as son of *John Knox*. There is no controversy between the brothers on this subject: he takes possession as one of the sons of *John Knox*, as executor *de son tort*; this he manifests by taking out administration in 1802: he also pays off debts of his father, and under those circumstances, it would require an accumulation of facts stronger than any in this case to establish the title sought to be set up. The doctrine of the common law with respect to tenants in common, bears on this case, and fortifies the position that the possession was not adverse. Combining the administration with the previous acts, I think adverse possession is out of the case. The correct view of his position is, that from the first he was administrator, and trustee for the surplus after payment of debts, and that he delayed taking out administration from motives of prudence; and, in this view, judging of the effect of length of time, we have only to regard it as between trustee and *cestui qui trust*, as in all

cases of direct trust, as *Beckford v. Wade*(a), *Chalmer v. Bradley*(b), *Skeffington v. Whitehurst*(c). The last case was decided on the ground that there was some evidence (which there is not here) of a release being executed; but upon its being argued, that length of time in that case created a bar, Baron *Alderson* observes (p. 34)—“Supposing *Alexander Hubbert* to be an administrator in the ordinary way, can you contend that there was any bar as between him and the next of kin; for whom, in that view of the case, he would be trustee?” So long as the relation of trustee and *cestui qui trust* continued with respect to this property, between *Henry Waring Knox* and *Thomas Knox*, no bar arises from lapse of time. There is no evidence that *Thomas Knox*, who left *Ireland* shortly after his father’s death, was a party to any of the acts of *Henry Waring Knox*, alleged on the part of the plaintiffs as evidence of exclusive ownership. They have failed to show that he was a party to the mortgage made to *Moreland*. Under these circumstances the case as between the brothers is reduced merely to non-claim on the one hand, and possession on the other, which, upon the authorities I have cited, does not operate in such a case to confer a title; nor does their case come within the exception to this rule with respect to constructive trusts, the extent of which is, that when in a case of fraud, the decree of a Court of Equity is necessary to declare a trust, then time shall create a bar; *Hovenden v. Lord Annesley*(d), in which case the Lord Chancellor says, “if a trustee is in possession, and does not execute his trust, the possession of the

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(a) 17 Ves. 87.

(b) 1 Jac. & W. 51.

(c) 3 Y. & C. 1.

(d) 2 Sch. & Lef. 607.

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“ trustee is the possession of the *cestui qui trust* ; and if the
“ only circumstance be, that he does not perform his trust,
“ his possession operates nothing as a bar, because his pos-
“ session is according to his title; but the question of fraud is
“ of a very different description ; that is a case where a
“ person who is in possession, by virtue of that fraud, is not
“ in the ordinary sense of the word a trustee ; but is to be
“ constituted a trustee by the decree of a Court of Equity
“ founded on the fraud ; and his possession, in the meantime,
“ is adverse to the title of the person who impeaches the
“ transaction on the ground of fraud.” A possession and
a trust obviously different from that direct trust which
exists between an administrator and the next of kin. With
respect to the absence of any claim on the part of *Thomas
Knox*, supposing him conscious of the facts ; it is important
to consider the state of the property. It was heavily incum-
bered with debts ; his right was only to a moiety of the sur-
plus, after payment of those debts. It is not too much to
say, that he was not guilty of culpable negligence in not
looking for an account. Nothing then having occurred
in the lifetime of *Henry Waring Knox* to determine the
relation of trustee and *cestui qui trust*, I do not see that any
alteration has taken place in the condition of this matter
since his death. Though the representatives of *Thomas
Knox* were brought originally before the Court, they were
made parties in reference to a different question. Nothing
occurred in the progress of the suit, to prevent his next of
kin from now contending that they are entitled to a moiety
of the lands : on these grounds, I am of opinion that a
moiety of the lands of *Ardmillan* was the personal estate of
Thomas Knox. I, therefore, pronounce the rule of the
Court, the fifth exception must be allowed.

With respect to *Tyrella*, it appears that in 1661, a term of 999 years was created in the lands of that name by the owners of the inheritance, for what trusts and purposes does not appear; but in the year 1727, it became absolutely vested

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Thomas Knox, (grandfather of *Henry Waring Knox* and *Thomas Knox*), who by his will, which is recited in one of the deeds, but not proved in the cause, bequeathed it

John Knox, charged with an annuity of £182 a year in favour of his daughter *Mary*. *John Knox*, by the mortgage-deed of 1771, conveyed these lands, (subject to the annuity), with other lands, to *Jane* and *Mary Knox*, to secure a sum of £8,000; and, in 1784, he purchased the fee for £50.

It was conveyed to him by a deed reciting, that he was possessed of a long term yet to come and unexpired in the said lands." It is contended by the plaintiffs that the term, though mortgaged, became attendant on the inheritance, though there was no express declaration to that effect. In support of the defendant's view of the point, some, though not much reliance was placed on the existence of the annuity above mentioned. It is plain that had *Thomas Knox* not mortgaged the term, but purchased the fee while possessed of the legal estate in the term, the mere existence of that charge would not have prevented the merger of the term in the fee: the charge would still subsist for the benefit of the annuitant, but, as between the fee and the term, a merger would take place. This is established by numerous decisions, particularly *Doe v. Hyde*(a). Again, had *John Knox*, after the mortgage, paid off the debt in his lifetime, without taking a re-assignment of the term, no question could exist as to the equitable

(a) 5 M. & S. 146.

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merger of the term. The term was not created with reference to that annuity; there was no trust in the mortgagee. This question must, therefore, be considered simply upon the effect of the mortgage upon the purchase of the inheritance. The case has been partly argued upon intention, that is, upon presumable intention, for no evidence has been offered on either side explanatory of the real intention of the purchaser. I cannot entertain a doubt that his intention was to acquire a consolidated interest; to unite the two interests in himself. He paid a sum of money (a small sum, no doubt) for it, but which, for any purpose besides uniting the interests, might as well have been thrown away. Can it be believed that he took the trouble of making that purchase for the mere purpose of leaving matters just as they were—leaving the beneficial interest to go in one channel, and the fee to descend, a worthless inheritance, to his heir-at-law? If any inferences are to be drawn from his doing nothing after the purchase, one may be that he thought he had done enough to unite the interests. The question is, whether, in equity, an union was prevented. That it did not take place at law is undisputed; but it is material to advert to the doctrine of merger as stated in *Doe v. Pyke*. From that case it appears that where the owner of a term, or other inferior interest, carves out of it a derivative interest, leaving in himself any *quantum* of reversion, and then purchases the fee, the term or other interest merges, notwithstanding the derivative interest, though it may subsist to support that interest, but no further. From that case it follows that had *John Knox* made the mortgage in this case by way of subdemise, leaving a reversion in *him*, it, as well as the term, would unite with the inheritance, save only so far as necessary to support the mortgage. This would be the plain conse-

quence at law ; now let us see what is the effect of the mortgage in equity. In the case of *Casborne v. Inglis*(a), also in 2 *Jac. & Walker*, in the appendix to which a copy of Lord *Hardwicke's* manuscript note of the judgment is inserted, it is said, "an equity of redemption is considered as an estate in the land ; it will descend, may be granted, devised, or entailed, and that equitable estate may be barred by a common recovery. This proves that it is not considered as a mere right, but as such an estate whereof, in the consideration of this Court, there may be a seisin, for without such seisin a devise could not be good. The person having the equity of redemption is considered as owner of the land, and the mortgagee is only entitled to retain it as a security or pledge for a debt." Again, in the same judgment he puts the strong case of the effect of a mortgage on a previous will. In law it is a total revocation of the devise ; but in the consideration of equity, it is only a revocation *pro tanto* ; it amounts to the same thing as letting in a charge upon it. The true ground of this is, that the ownership of the land doth in equity remain in the mortgagor, and therefore it shall pass by his devise, though made precedently to the mortgage. In *Hall v. Dench*(b) this principle is established. In *Cholmondeley v. Lord Clinton*(c), Sir *Thomas Plumer* says, "Is any point better established than that a mortgagor, after executing a mortgage in fee, and after the condition forfeited, is still considered to remain the absolute owner of the estate, as he was before, for every purpose, as against all the rest of the world, and as against the mortgagee, for every other purpose, except only the security and pledge which

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(a) 1 Atk. 609.

(b) 1 Vern. 329.

(c) 2 Jac. & W. 178.

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“ the estate is become for the repayment of the debt contracted by the mortgage ?” That the term and the fee will go in the same line is shown by the case of *Capel v. Girdler*(a). In that case the owner of a term for years made a will, and afterwards contracted for the purchase of the fee, but died before the purchase was completed. The legal estate was in the vendor, but in equity the vendee was considered owner. On a bill filed by the heir-at-law for a conveyance, the Master of the Rolls said, “ having contracted for the purchase of the inheritance he became complete owner of the whole estate ; for it is clear that, in this Court, a party contracting for the purchase of an estate is equitable owner ; the vendee is a trustee for him. I thought it was long established that when the same person has the term and the inheritance, though the one is the legal and the other the equitable estate, the inheritance draws to it the term.” The difference between that case and the present is this, that in the former the unpaid charge was on the inheritance, in this on the term. In both, the owner had the power of getting a legal conveyance on payment of the charges ; in both, the party was the owner in equity, subject to the charge. Without saying that the case is a direct authority, I cannot help considering that it bears strongly on the present case, in support of the claim of the heir at law. The existence of a charge not connected with the original trust of a term will not keep that term separate from the inheritance against the heir at law. We are not dealing with any claim of creditors ; possibly if that were the case, it might be held differently, but it would not follow, even in that case,

(a) 9 Ves. 509.

that the surplus would not go to the heir(a). In *Faucet v. Austin*(b) the question was not as between the heir and next of kin. This case differs from *Scot v. Fenhouillet*(c), on which case is rested the position, in the 3rd volume of Sir *Edward Sugden's* work on estates, that a beneficial interest outstanding in a third person will prevent a term in which such an interest is charged from attending the inheritance. In that case the trustees of the term could not have conveyed it to the purchaser of the fee without a manifest breach of trust ; and, therefore, Lord *Thurlow* says, "the impossibility he (the purchaser) was under of purchasing the whole term, rendered an express declaration necessary." It was clearly an unsatisfied term, as to the trust with which it was clothed ; it is, therefore, clearly on that ground distinguishable from the present case. On these grounds we are of opinion that the term in this case did attend the inheritance.

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PENNEFATHER, B.—The Chief Baron has so fully expressed the judgment of the Court, and I so fully concur in the reasons assigned by him, that I feel it unnecessary to go at any length into the circumstances of the case. We were struck for a considerable time on the question, with respect to *Armillan*, by the long possession of *Henry Waring Knox*, and the manner in which it appears he acted with regard to those lands. I think that possession has been fully explained by the circumstances in which he was placed. It cannot be considered that it was by mere length of time, those acts which he did vested a title in him. It

(a) See *Chapman v. Bond*, 1 Vern. 188.

(b) Prec. Chan.

(c) 3 Sug. Es. 89, & 1 Bro. C.C. 6, 9.

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might be enough to consider how things stood at the time of the death of *Henry Waring Knox*, for the exception is to a report, which states that *Ardmillan* formed part of the personal estate of *Henry Waring Knox* at the time of his death, which took place in 1809, only 18 years after the death of *John Knox*, so that if the possession had been adverse, it could not have *per se* transferred the property to him. Therefore if we were to go merely on the report as it stands, we should be constrained in that view to differ from the conclusion to which the officer has come. But in truth it does not rest on this ground: there were no circumstances from which adverse possession could be presumed. *Henry Waring Knox* was in possession of the property in discharge of a manifest trust, not a constructive trust; it was one he undertook to perform on the death of his father, and which in 11 years after he clothed himself with the legal powers of carrying into effect. In 1802 he took out administration to *John Knox*, and assumed the character of rightful administrator; by that he showed the character in which he entered into possession. Then, what follows after the death of *Henry Waring Knox*? (though, as I said, the exceptions might be ruled by the state of things at his death). *Thomas Knox* had previously died, leaving children; no presumption could be raised against them: their rights were never represented in the cause. Much confusion has arisen from the number of bills that were filed, and the character ascribed to different persons brought before the Court. From these it appeared that at one period the minors were represented, and that there was before the Court a person properly qualified to take care of their interests; and a decree was pronounced, in which it was assumed that this was the property of *Henry Waring*

Knox. It became necessary to examine exactly how that decree was pronounced, and who were the parties before the Court at the time. On that investigation it appeared clearly that there was not any proper legal representative, either of *John Knox* the original intestate, or of *Thomas Knox*, before the Court at the time that decree was pronounced—no one to protect the interests of the minors—therefore that decree could not affect them. There is nothing since the death of *Henry Waring Knox* to alter the state of things as it existed previously. There was no agreement between the brothers. Length of time could not be a bar. *Henry Waring Knox* was in possession, in pursuance of a plain trust, and therefore we cannot consider this property as having become his. With respect to *Tyrella*, *John Knox* was possessed of the equity of redemption in an old term; in equity he was possessed of the term, for it was only pledged to the mortgagee; and afterwards he purchased the fee. The term must attend the inheritance. Of course I assume a state of things in which the term could be kept alive at law. On what principle is this? It is this—that a person possessed beneficially of the term, and purchasing the inheritance, or, vice versâ, must be presumed to do so in order that both shall be in the same line. That is the object he must be presumed to have had in view, if no declaration of intention be made. If the mortgagee, in the eye of a Court of equity, has nothing but a pledge or security, and if the entire interest be in the mortgagor, why should not the same rule apply? There is no reason for a different construction. What possible motive can be assigned for the purchase in this case by *John Knox* of the reversion in fee? It was a dry, naked reversion, yielding nothing. What

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motive could be assigned, but that the inheritance and the term should go in the same line, that is, to the heir; he preferring the heir, and making that preference by the purchase (the law also preferring the heir), no reason can be assigned for the purchase but that preference. If this mortgage be out of the case, the annuity alone cannot prevent the attendance of the term or the inheritance; a mere annuity charged upon a term cannot have that effect. It is clear then, that if neither of these things can have that effect separately, they cannot have that effect when united. If the persons legally entitled to the term had duties to perform, such as debts to pay, or any trust to execute, it might be otherwise; because it could not be presumed that they would commit a breach of trust in assigning over their interest in the term at the desire of a purchaser in fee. That is the ground of distinction, as it would appear to me, taken in *Scott v. Fenhouillet*. On this part of the case I have thought it right to say more than would, perhaps, have been otherwise necessary, on account of what appears in the work of an individual, whom we must all treat with respect in what he says, not only from the bench of justice, but in his writings. But it would appear to me, looking through the whole passage, and not confining myself to the mere position laid down in the first part of the paragraph, that the conclusion to which he himself would come would not be adverse to that at which we feel it our duty to arrive. I hope, at least, it would be so. We must, nevertheless, hold and express that opinion, which we conscientiously entertain, and the ground of distinction stated in the work, not appearing, in my mind, to warrant the difference of conclusion, we are bound to say that we ought not to be controuled in any

way by the passage in his work. On these grounds,
I am of opinion, that term was attendant on the inheritance.

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RICHARDS, B., concurred.

Baron FOSTER was absent.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER

IN IRELAND,

IN HILARY TERM, IN THE FIFTH YEAR OF THE REIGN
OF QUEEN VICTORIA, AND THE SITTINGS AFTER.

1842.

EXCHEQUER
OF PLEAS.
Wed. Jan. 12.

JACKSON v. GERING.

A *sci. fac.* issued to revive a judgment in Trinity Term, 1840, and a rule for judgment thereon was regularly entered, which expired 9th Nov. 1840. It was lately discovered that no judgment was entered thereon. The Court granted a conditional order to mark judgment.

O'DWYER for the plaintiff, applied for a rule for liberty to mark judgment on a *scire facias* to revive a judgment of Michaelmas Term, 1820, for £2,000 obtained by one *George Jackson* against the defendant. The conuzee died in 1823, having appointed the plaintiff. The plaintiff's attorney swore that having received instructions to revive the judgment, he on the 27th May, 1840, obtained an order for a *scire facias* to revive it, which order was served on the defendant personally on the 5th June following. On the same day the defendant wrote a note to the plaintiff, in which he stated, "your man has this day served me with the notice for reviving judgment on my bond,"

and then went on to say, "of course I would use no opposition to you in this business." The *scire facias* issued in Trinity Term, 1840; and on the 15th October, 1840, a copy of the *scire facias* was served on the defendant personally. The defendant never appeared or pleaded to the *scire facias*; and the rule for judgment expired on the 9th November, 1840. The plaintiff's attorney further swore that though the rule for judgment had been regularly entered, no judgment had been marked, and that this latter fact had been only lately discovered. The entire amount of the principal sum was due; no interest had been paid on foot of the judgment since May, 1840. The officer had refused to mark judgment, more than a year having elapsed since November, 1840, when the rule for judgment expired.

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COURT.—Take a conditional order.

SIR GEORGE COCKBURN v. WARNER.

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EQUITY
EXCHEQUER.
Thur. Jan. 13.

HENRY SMITH being, in the year 1721, seized in fee of the lands of *Smithsboro'*, and other lands in the pleadings In 1776 a commission of bankrupt issued against A, and the assignee entered into possession of A's estates. A afterwards, in 1793, became indebted by judgment to C., and afterwards devised all his real and freehold estates to B. and his heirs, upon certain trusts, and charged with his debts and legacies. The defendant who was heir at law of the assignee, had continued in possession of the lands, and after the institution of a suit against him by the devisees of A. to recover possession of these estates, purchased them from the persons beneficially entitled under A.'s will, subject to the incumbrances affecting them, and obtained a conveyance of them in 1825. The judgment of 1793 had not been revived or redocketed within 5 years after the passing of the Redocketing Act. Held, that the trust for payment of debts prevented the judgment being barred under the Redocketing Act.

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mentioned, by his will, dated 7th June, 1721, duly executed and attested, devised the said lands to John Barlow, and the heirs male of his body, and, in default of such issue, to the testator's nephew, Robert Haughton, and the heirs of his body lawfully issuing for ever; with other remainders over. Henry Smith having died, Barlow entered into possession of the lands so devised to him, and died in 1744, without issue male. Upon Barlow's death, Robert Haughton entered, as remainder-man under the will of Henry Smith, into possession of the said lands, and remained until 1768, when he died, leaving Henry Haughton, his son and heir at law, who, as such, entered into and became seized of the lands, as tenant in tail in possession. On the 14th and 15th June, 1773, Henry Haughton, in consideration of £500, conveyed the said lands, by lease and release, to Charles Craig as a purchaser thereof, and afterwards duly levied a fine, and suffered a recovery of the same lands, the uses whereof were declared to be to Charles Craig and his heirs. In 1776, Charles Craig became a bankrupt, and Gustavus Warner, (the father of the defendant, Gustavus Meredyth Warner) with two other persons, were appointed his assignees; Gustavus Warner was the acting assignee, and survived his co-assignees. It was stated that this was a friendly commission, and was prosecuted by Gustavus Warner, who was the confidential friend and attorney of Charles Craig, and that after the issuing of the commission, Charles Craig had acted as owner of the said property, both personally and through his agents. On the 14th September, 1793, Charles Craig, and his eldest son George Craig, executed their joint bond and warrant of attorney to enter judgment thereon, to secure the sum of £273 10s. 10d., Irish currency, to Andrew Caldwell, his executors, administrators, and assigns.

Andrew Caldwell died in 1808, having appointed one *Peter Walsh*, and the plaintiffs, *Sir George Cockburn* and *Frederick French*, his executors; the two latter proved the will. *George Craig* died in 1797, leaving *Charles Craig* him surviving, against whom, as surviving obligor, judgment on the said bond was entered in Hilary Term, 1804. *Charles Craig*, by his will, devised all his real and freehold estate to *Sir George Cockburn*, and his heirs, upon certain trusts, and thereby charged his real and freehold estate, with his debts and legacies. He bequeathed some legacies, and gave all the residue of his estate, real and personal, to his daughters, *Margaret* and *Elizabeth*, (who then resided in *America*) in equal shares as tenants in common in fee. He appointed four persons his executors, all of whom having died, *Mrs. Travers Wright* obtained administration to the said *Charles Craig*, and became his personal representative. *Charles Craig* died on the 26th February, 1804, without having paid the debt and costs, or any part thereof, to *Caldwell*. He left no personal property, having died in distressed circumstances. In the year 1827, *Thomas Humphreys* and *Richard Jackson*, as executors of the late *John Humphreys*, filed a bill in this Court against the defendant, *Gustavus Meredyth Warner*, and the plaintiff, *Sir George Cockburn*, and the legatees of *Charles Craig*, praying an account of the debts and legacies of *Charles Craig*, and that the trusts of his will should be carried into execution. To this bill *Sir George Cockburn* filed his answer on 8th April, 1821, in which he admitted the devise to him by the will of *Charles Craig*, and put forward the claims which he, in conjunction with *French*, as executors of *Andrew Caldwell*, had upon the estates of *Charles Craig*. A compromise was effected between the plaintiffs in that suit and *Gustavus Meredyth Warner*, the former having been paid their demand.

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The daughters and devisees of *Charles Craig*, who had lived in *America*, having died leaving children, who, as representing their respective mothers, became entitled to the estates so devised, and having appointed a person named *Colt*, their attorney, threatened to commence proceedings to recover the property devised to them from *Gustavus Meredyth Warner*, who had continued in possession of these estates. *Gustavus Meredyth Warner* agreed to purchase the interest of these parties for a sum of £12,000, which interest was accordingly conveyed to him in 1825, subject to all the charges and incumbrances affecting the said lands. The plaintiff's solicitors, on the 9th December, 1825, wrote a letter to *Gustavus Meredyth Warner*, stating that they had heard that by the settlement made by him with the representatives of Mr. *Craig*, it had been arranged that he should pay off the debt due to the plaintiff's testator, and requesting to know whether they should furnish him (*Warner*) with an account on foot of the judgment, and whether he would have a warrant to satisfy or an assignment of the judgment. To this no answer was returned, and thereupon another letter was written by the plaintiff's solicitors to *Gustavus Meredyth Warner*, expressing their anxiety to effect an amicable settlement of accounts without incurring expenses at law. The plaintiff's solicitors wrote also to Mr. *Colt* informing him of the claim of Mr. *Caldwell's* executors in respect of the judgments entered on the joint bond of *Charles* and *George Craig*, and apprising him that they had written to *Gustavus Meredyth Warner*, from whom they had received no answer, and demanding payment of their client's demand. The plaintiffs then filed their bill against *Gustavus Meredyth Warner* and *Travers Wright*, praying that the trusts of the will of *Charles Craig* should be carried into execution,

l for an account: the judgment had not been revived redocketed within the five years given by the redocket-act, from the 27th June, 1828.

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Gustavus Meredyth Warner by his answer admitted the gnment in bankruptcy to *Gustavus Warner*, but denied t it was a friendly commission, and alleged that the t for which the commission issued was still unpaid. He denied that *Charles Craig* had acted as owner of the l property, either by himself or his agents after the ing of the commission: he admitted that he had be- ne purchaser of the estate from the devisees under the ll of *Charles Craig* for £12,000. He did not rely upon : statute of limitations as a bar to the plaintiff's im.

Gustavus Meredyth Warner having died, the suit had en revived against his personal representatives: his devi- es also had been brought before the Court.

Mr. Serjeant *Warren*, Mr. *Litton*, Q. C., and Mr. *Cooke* r the plaintiff.

Mr. *Holmes*, for the defendants, the representatives of *Gustavus Meredyth Warner*, relied on the length of time hich the plaintiffs had suffered to elapse without having ttempted to carry the trusts of *Craig's* will intoe xecution. t is contended by the plaintiff that the debt is not barred y the statute of limitations, because by the will of *Charles Craig* a trust was created for the payment of his debts; but ven if the debt be not barred, the laches of the plaintiffs or nearly forty years ought to dispose the Court not to

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entertain it. But supposing the statute of limitations to be out of the case, this judgment is an absolute nullity, by the third section of the Redocketing Act^(a), which makes void, as against all purchasers for valuable consideration all judgments not revived or redocketed pursuant to that act. The case is within the third section of that act.—[RICHARDS, B.—The purchase was made by *Gustavus Meredyth Warner* pending the suit: the question is, was the judgment null and void when the suit was instituted? He was a purchaser before any suit was instituted. No Court of Equity can proceed upon a debt which a positive statute has annihilated. [LEFROY, B.—Do you hold that the act applies as between trustee and *cestui qui trust*? There was an original trust in respect of this judgment.] *Warner* was himself a purchaser for value, and has a right to avail himself of every advantage which the law allows him in respect of the incumbrance.

Mr. *Collins*, Q.C., Mr. *Baker*, and Mr. *Edward Wright* for the other defendants.

BRADY, C. B.—We must decree that the trusts of the will be carried into execution, and an account be taken

(a) 9 Geo. IV. c. 35, s. 3, enacts, that all judgments which shall have been entered or recovered in his Majesty's Courts of King's Bench, Common Pleas, or Exchequer in Ireland, twenty years or upwards next before the passing of this act, shall be null and void as against all purchasers for valuable consideration of any lands, tenements, or hereditaments in Ireland, whether their purchases shall have been made before or after the passing of this act, unless the same shall be duly revived according to the course and practice of the said respective Courts, or redocketed in manner hereinafter directed, and the revival or redocketing thereof be entered in the manner hereinafter mentioned, within five years from the passing of this act.

ordingly. We also direct an account of the sums due
foot of the judgment, and of the real estates of *Graig*.
ce a decree as prayed.

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Decree accordingly.

PURCELL v. COLE.

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Thur. Jan. 13.

TRICK PURCELL, by his will, dated 31st January 1822, executed, devised all his lands, tenements, and premises, which he might be possessed of at the time of his decease, to his three sons *Andrew*, *Patrick*, and *Lewis*, to have and share alike; and if any or either of his said sons should die, then the survivor or survivors of them to inherit the said lands, as also whatever stock might be in possession belonging to him, the said testator, at the time of his decease; and bequeathed a sum of £600, due to the testator by *J. Murphy*, to the testator's three sons before mentioned, and his four daughters, *Bridget*, *Mary*, *Jane*, and *Catherine*; the same to be divided between the testator's seven children before named, share and share alike; and if any or either of the testator's said children should die, then their proportion of said £600 to be divided amongst the survivor or survivors of them, share and share alike; and the testator directed, that if any or either of his said children should marry against the consent of their guardians thereafter named, that then they should be cut out to £50, and the remainder of their shares be divided

An account decreed against an executor after nine years; notwithstanding an account totted by a mutual friend of the plaintiffs and defendant, and admitted by the plaintiffs in 1833, but not then examined by them or vouched by defendant. Such account is perfectly inoperative against minors claiming under the testator's will.

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among the rest of the testator's children ; and the testator further directed, that all his said children should be supported, clothed, and educated, and live at the testator's house, at *Clonfad*, out of the profits of the said lands of *Clonfad*, and also the interest of the £600 before mentioned, until testator's said children should marry ; and the testator, by his said will, appointed *Christopher Cole* to be guardian over his (the testator's) said children. He did not appoint any executor.

The testator died in February, 1822, leaving his sons *Andrew* and *Patrick*, and other children him surviving. *Christopher Cole* took out administration to the testator, and undertook the execution of the trusts of his will, and took possession of the testator's personal estate and effects. *Lewis*, the testator's third son, died soon after his father, under age, intestate and unmarried, and letters of administration to *Lewis* were granted, on the 30th May, 1840, to *Patrick Purcell*, who had attained his age on the 25th November, 1834. The testator's said daughters continued to reside after his death, at *Clonfad*, as directed by their father's will, and were supported out of the said lands of *Clonfad*, and the interest of the said sum of £600, until attaining their ages of 21 years, when they were respectively paid by the defendant *Cole*, certain sums, as for their respective legacies, and retired into convents ; the sons also resided principally there, and occasionally with their friends and relatives. *Patrick Purcell* the younger, resided for some time with *Christopher Cole*.

The bill in this case was filed by *Patrick* and *Andrew Purcell* against *Christopher Cole* and the plaintiff's sisters,

prayed an account of the testator's personal estate and his debts, and that his personal estate might be applied in due course of administration, and that the defendant should account.

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The defendant *Cole*, by his answer, admitted the bequest of his being administrator of the testator, and that he had taken possession of some of his personal property; alleged that the greater part of his farming stock, &c., had been sold off before the defendant became his administrator, to pay off the head rents due upon the lands bequeathed by the testator, the produce of which was applied for the maintenance and education of the plaintiffs and their sisters: and that in October, 1833, the plaintiff *Andrew Purcell*, then of full age, he had given up to him the management of all the lands which remained of the said testator, for his (*Andrew's*) own benefit and that of his brother *Richard*; and had given up to them at the same time the stock and other property on the said lands, to the value of £210s.: he claimed also to be entitled to credit for a balance of £162 15s. for the expenses of the farm, and to be repaid for the maintenance and expenses of the plaintiff *Richard Purcell*, during his residence with him. The defendant further stated that the defendant, before he had been appointed to manage the farm, had given a full and satisfactory explanation and detail of the manner in which he had managed the said property to one *Andrew Reilly*, a brother-in-law of the plaintiffs, who was called upon by the plaintiffs to examine into the state of the property; and that upon that occasion a valuation of the stock, corn, and farming utensils, and household furniture was taken, and the same calculated to amount to the sum of £462 10s.;

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and stated, as evidence that the plaintiffs were satisfied with his conduct, that the plaintiff *Andrew*, after having disposed of the said stock and his interest in the farm, had gone, in 1836, to the *United States of America*, and that the plaintiff *Patrick*, when on his way to join his brother in *America*, had, in 1837, written a letter to the defendant, apologizing for some ungrateful conduct towards the defendant, and expressing contrition for the same.

It appeared that the plaintiffs had sold their interest in the lands of *Clonfad*, in 1836, and had gone to *America*; but having been unsuccessful there, they returned to *Ireland*, in 1838. After their return *Andrew Purcell* was again on terms of intimacy with the defendant, and had written to him a proposal of marriage for one of his daughters.

The defendant also stated in his answer that when he had given up the management of the property to the plaintiffs, he left in the house at *Clonfad*, a quantity of accounts and vouchers relating to the receipt and expenditure of the testator's property, and was now unable to procure the same.

Andrew Reilly's evidence was, that he was present about the time alleged at the stating of an account between the plaintiffs and defendant, touching the effects of *Patrick Purcell*, but that he could not take upon him to say whether the said accounts were fully or fairly stated or investigated; the witness having merely, at the request of the parties, attended at *Clonfad*, without having had any previous knowledge of the transactions; and having simply looked at and totted some entries in a book produced by *Cole*, con-

ing his accounts with the *Purcells*; which the witness said to be, as he thought, correct; but he did not investigate the items, and did not consider that an account was given or at all settled at that meeting. On his cross-examination he said that he thought all the parties relying on the integrity of *Cole* were satisfied of the correctness of the accounts, without at all understanding them, except *Richard Purcell*, who appeared dissatisfied; but none of the others said much on that occasion. The first item in this account consisted of a considerable balance, which appeared to have been brought forward from another book, which was not produced.

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Mr. Nelson, Q.C., and *Mr. Murland*, for the plaintiffs, contended that the account, if settled in 1833, between the plaintiffs and *Cole*, could not bind the younger children, who were then under age.

Mr. Brewster, Q.C., and *Mr. Thomas Kennedy*, for the defendant *Cole*, relied upon the letters from the plaintiff, *Richard Purcell*, to the defendant, apologizing for his conduct, and upon his having proposed for the defendant's daughter in 1839. The account was settled between the parties in 1833, and six years are allowed to elapse, from that time, without any objection being made on the part of the plaintiffs. It would be a case of great hardship on the defendant, who managed the affairs of this family so long a period, if, after the lapse of so many years, he were now compelled to account anew.

BRADY, C. B.—It is quite plain that the defendant was trustee for the plaintiffs, and had made himself responsible

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to them for his conduct in the management of their affairs. He was clearly bound to account. It is urged that he had accounted, and that the plaintiffs are bound by that account, and had the account been of the nature stated, there might be no grounds for now calling for another. But it is clear that no account was ever settled of the nature alleged, and that the parties acted more upon the faith of *Reilly's* approbation of it, than upon the examination of what the book itself contained. That cannot be considered as such an account as ought to bar the parties from their right to have an account in the ordinary way. With regard to several of the items contained in the account already given, the defendant would be entitled to vouch them by his own affidavit. From the lapse of time being so great since these transactions, we think the defendant ought to be allowed to vouch, by his own affidavit, items of a greater amount than forty shillings, with the exception of one item, which is a large sum brought forward from another book. That item must be taken in the ordinary way in the office. According to the case of *Kilbee v. Sneyd* in *Molloy*(a), the account already furnished would be quite inoperative as to the minors. Let an account be taken as prayed.

RICHARDS, B.—With respect to the statute of limitations, no question arises here; for the party here has not relied upon that statute by his answer.

LEFROY, B.—The very nature of the account already settled, does not, on the face of it, import to be such an

(a) 2 Mol. 186.

s should bind a person in the position of the
 here. It is impossible they should be bound by
 an account, professing, on the face of it, to be a
 explicit account of all sums which had come to the
 the defendant, from the time when he first began
 respect of the property of the testator. The
 relied upon is one which, from its insufficiency,
 have sustained a release, as appears from the
Worgan v. Lewis, decided by the House of Lords(a).
 Evidence only shows that one book of accounts was
 but the plaintiffs have passed an item of £
 without having seen the previous book, from which
 was taken.

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Decree to account, as prayed; and let the
 entries in the book or books produced to
Andrew Reilly, and examined by him, be
 received as *prima facie* evidence for the
 defendant.

(a) 4 Dow. P. C. 29.

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Sat. Jan. 15.

VINCENT v. WILLINGTON.

JUDGMENT was obtained on a joint bond and warrant of attorney against A and B in 1815; B had joined in these as a security for A. On the 16th March, 1820, A wrote to V's agent, "You have enclosed £150 to my credit on account of V's interest;" and in the account-book kept by V's agent, (since dead) appeared an entry by the agent, of 17th March, 1820, charging himself with a bill for £50 drawn by A., and £100 cash from A. In 1822, V's attorney applied by letter to B. calling for payment of the amount of the above debt, and B. on that occasion wrote to V's attorney, acknowledging the receipt of his letter, "applying for payment of his B.'s and A.'s joint bond," and soon after B.'s agent wrote a letter to V's attorney, enclosing a proposal of terms upon which the matters should be arranged by A., and said "this being done, it is hoped the judgment against B. will be satisfied." The bill was filed in 1839.

Held, that this was sufficient payment and acknowledgment to take the case out of 3 & 4 W. IV. c. 27. *Quere*. Does that statute repeal the 8 Geo. I. c. 4. *Irish*?

JOHN WILLINGTON and *Thomas Going*, on the 10th of August, 1814, jointly executed two bonds to Colonel *William Vincent*, his executors and administrators, one for the penal sum of £6,000, the other for the penal sum of £2,000, with warrants of attorney for confessing judgment thereon. Judgments were entered upon both bonds in Trinity Term 1815. Interest on the aforesaid judgments was paid to the conusee for a considerable time afterwards by *Going*, who was the principal debtor, *Willington* having joined in executing the bonds and warrants only as a surety for him. *Thomas Going*, who was a banker, executed a conveyance of all his property to trustees, under the Banker's Act, 33 Geo. II. c. 14, s. 10; but it was alleged that the majority of his creditors had never executed this conveyance, and that if executed, it had never been acted on. In 1817 *John Willington*, who was then tenant for life of certain real estates, with remainder to his eldest son in tail, joined with his eldest son *James Willington* in barring the entail and resettling the estates upon the father for life, remainder to the eldest son for life, remainder over in tail. It was proved by the plaintiffs that in the year 1820, a Mr. *Robert Newenham* was agent for

Colonel *Vincent*, and was in the habit of receiving rents and interests for him ; and they also proved an account-book in which *Newenham* kept his accounts with Colonel *Vincent*, in which was contained the following entry to the credit of Colonel *Vincent* :—

1820, 17th March.	Going - - - Dexter - -	£50
	Cash per do. - - - - -	100

They also offered in evidence as an explanation of this entry, to show that it was made on account of interest upon the before mentioned bonds, the following letter :—

“ To *Robert Newenham*, Esq.,
&c. &c.

“ 16th March, 1820.

“ DEAR SIR,

“ You have inclosed £150 to my credit, on account of Colonel *Vincent's* interest. There is one year due, the balance of which shall also be forwarded to you in a few days.

“ I am Sir, &c.

“ *Thomas Going.*”

It appeared also that at the time when this letter was written, *Thomas Going* was a banker.

On 23rd September, 1820, Mr. *John Willington* addressed the following letter to Mr. *Newenham* :

“ *Castle Willington*, 23rd September, 1820.

“ SIR,

“ I have received your favour of the 12th instant, in which you state that you have received direction from

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WILLINGTON. “ Colonel *Vincent*, to apply for payment of mine and Mr.
“ *Going's* joint bond for £4,000. I should have answered
“ your letter long since, but wished first to consult with
“ Mr. *Going*, whose debt this is, on the subject.

“ I have since seen him, and he has told me that he has
“ written to you. I have, however, instructed my law
“ agent, Mr. *R. Maunsell* of *Merrion-square*, to communicate
“ with you on his arrival in town, which will be in the
“ course of a week ; when he will call upon you and fully
“ explain matters to you.

“ I remain your obedient servant,

“ *John Willington.*”

On the 7th November, 1820, Mr. *Maunsell*, who was
proved to have been the law agent of Mr. *Willington*,
wrote to Mr. *Harris*, the solicitor for Colonel *Vincent*, as
follows :—

“ DEAR SIR,

“ I send you inclosed a short statement of what
“ Mr. *Willington* proposes should be done, with regard to
“ Colonel *Vincent's* demand on Mr. *Going*. I assure you
“ Mr. *Going* is good security (much better than Mr.
“ *Willington*) for the money.

“ Yours, &c.,

“ *R. Maunsell.*”

“ Mr. *Going* proposes to procure an assignment to
“ Colonel *Vincent*, of one of the first judgments obtained

“against him, and also that Mr. *Going*’s eldest son shall
 “join his father in a bond to Colonel *Vincent*, as a colla-
 “teral security. In that case Colonel *Vincent*’s demand,
 “against Mr. *Going*, will be well secured, Mr. *Going*
 “having an unsettled estate of from £3,000 to £4,000
 “per annum, and his son being entitled to an estate of
 “from £1,500 to £2,000. On this being done, it is
 “expected that the judgment against Mr. *Willington* will
 “be satisfied. Mr. *Going*’s agent will satisfy Mr. *Harris*
 “of Mr. *Going*’s security, and will let him have a
 “statement of his property on his arrival in town; but
 “should not this proposal be acceded to, it is at all events
 “hoped that proceedings will not, in the first instance, be
 “taken against Mr. *Going*.”

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John Willington died 13th April, 1821, having by his
 will bequeathed his personal property to his wife on trust
 to pay his debts out of his personalty; and upon his death,
 his eldest son, *James Willington*, became tenant for life of
 the real estates of his father, by virtue of the settlement of
 1817. Colonel *Vincent* died soon after; and on 17th May,
 1822, Mr. *Harris*, the solicitors for his executors, addressed
 this letter to Mr. *James Willington*:

“ 17th May, 1822.

“ SIR,

“ I have been directed by the executors of the late
 “ Colonel *Vincent* to apply to you for a settlement of two
 “ judgments obtained against your late father on his
 “ joint bond with Mr. *Going* for £4,000, which we
 “ request you will have put into an amicable mode

1842. " of adjustment to prevent the necessity of law pro-
 VINCENT " ceedings.
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 WILLINGTON.

" We are, &c.,

" *Michael Harris & Co.*"

This letter was immediately afterwards enclosed by Mr. *James Willington* to Mr. *Maunsell*, with the following note :—

" DEAR ROBERT,

" I send you a letter I have this moment received, and
 " lose not a moment in waiting upon the writers. You
 " know very well that I, at all events, have nothing to do
 " with the matter.

" Yours, &c.,

" *James Willington.*"

On 23rd May, 1822, Mr. *Maunsell* wrote a note to Mr. *Harris*, requesting that no proceedings might be taken in respect to Colonel *Vincent's* demand until he (*Maunsell*) should see either him (Mr. *Harris*) or his partner the following day. The judgments were revived against the representative of *Going*, in 1834, but not until after the act 3 & 4 Will. IV., c. 27, had come into operation. The bill in this cause was filed, in 1839, by the executors of Colonel *Vincent* against *James Willington* and others, and prayed an account of the sums due on foot of the before mentioned judgments for principal, interest, and costs. The defendant relied upon the statute of limitations, and the question was whether, under the foregoing circumstances, the judgments of 1815 were barred by the statute.

r. *Moore*, Q.C., Mr. *Collins*, Q.C., and Mr. *Rolleston*,
 the plaintiffs.

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They contend that the payment of £150 in 1820, to
Newenham, who is proved to have then been the agent of
 the said *Vincent*, with which payment *Newenham* charges
 himself in his account with his principal, is sufficient to
 take the case out of the Statute of Limitations; as by the
 order of March, 1820, that sum is identified with a pay-
 ment made by *Going* on account of interest on these very
 payments. Also, there is a sufficient acknowledgment
 of the debt given by *John Willington* in the letter of the
 1st of September, 1820, in which he recognizes the amount
 of the bonds, and states that he had given instructions to
 his agent, Mr. *Maunsell*, who, by his letter of 7th
 of November, 1820, clearly acknowledges the existence of
 the plaintiff's demand, in the statement he subjoins of
 what should be done in respect of it. Then the will of
Willington in 1821 contains a trust for payment of
 his debts. [RICHARDS, B.—That is only a trust for pay-
 ment of his debts out of the personalty.] *Jones v. Scott*(a),
 is that a trust for payment of debts in a will of per-
 sonal estate, will prevent the operation of the Statute of
 Limitations. [RICHARDS, B.—That case was reversed by
 the House of Lords.] The 40th section of the Statute
 of Limitations is to be read as divided into two parts;
 the first has respect to a *bonâ fide* payment by a person
 liable to pay, or his agent, of principal or interest; the
 second to an acknowledgment in writing signed by the
 person liable to pay, or his agent. It is not necessary to

(a) 1 Russ. & Myl. 282.

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consider whether the old statute 8 Geo. I. c. 4(a) is repealed by the late Statute of Limitations; both acts may be considered as running together, and the old statute is not repealed where not touched by the new one; but here we have both a payment and an acknowledgment. [BRADY, C. B.—The question came before me at *Nisi Prius* in the case of *Morrrough v. Power*, in which a bill of exceptions is now pending, how far the new act takes away the power of giving proof of a proceeding which would take the case out of the former act. In that case the acknowledgment relied upon is, that the debtor, before the 20 years had expired, had filed his schedule as an insolvent, in which he acknowledged the judgment to be due. There were pleas of payment under the old act; and I held that there being no actual payment, the defendant could not now avail himself of that defence under the old statute; and I directed a verdict for the plaintiff.]

Mr. *W. H. Griffith*, for the first tenant in tail, contended that the proper parties are not before the court: *John*

(a) 8 Geo. I. c. 4, s. 2, enacts, that if after the 25th December, 1733, any person shall commence or prosecute any action or suit, either at Law or in Equity, for recovery of any debt due by single bill or bond under hand and seal, or by judgment, statute staple, statute-merchant or recognizance, which shall have been due and payable by the space of twenty years before such action or suit brought, where no action or suit hath been prosecuted for recovery thereof, nor any interest or money hath been paid, or other satisfaction made on account thereof, within the space of twenty years next before the commencement of such action or suit, the defendant or defendants shall and may be at liberty to plead payment in bar of such action or suit, and such plea shall be received and allowed as an effectual bar thereof, unless the plaintiff or plaintiffs in such action or suit, or those under whom he or they claim, hath, or have commenced or prosecuted some action or suit for the recovery of such debt or duty, or shall prove that some interest or money hath been paid, or other satisfaction made on account thereof, within the space of twenty years before such action or suit commenced.

Willington appointed his wife, *Thomas Going*, and Sir *John Bernard*, his co-executors. The two latter renounced probate, and administration had been granted to the wife; but she is now dead, and administration *de bonis non* has been granted to her representative; but it does not appear that her co-executors are dead, and the administration *de bonis non* is void. [LEFROY, B.—It is only void if the other parties come in. BRADY, C. B.—It does not occur to me that the executor must renounce *de novo* on the death of every co-executor before administration can be granted *de bonis non*. The executors have renounced before, and we must presume the Ecclesiastical Court did its duty. LEFROY, B.—The letters of administration, *de bonis non*, recite that the two other executors renounced and died.]

Mr. *T. B. C. Smith*, Q.C., Mr. *Gayer*, and Mr. *Leahy*, for *James Willington*.

The only question in the case is, whether the case is taken out of the Statute of Limitations. Three matters are relied upon to take it out of that statute. The first is payment: the entry, however, contains no statement upon what account such payment was made. It is sought to identify this by the letter from *Going*, but that evidence is insufficient. The entry of *Newenham* is good to charge himself, but has no connexion with any judgment or debt in particular. To take the case out of the statute, the payment must be not only on account of the same debt, but of the same security. *Home v. Green*(a) is an analogous case to this. It is asserted here that we

(a) 1 Star. N. P. R. 488

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should show that there were other accounts to which payment might be applicable; but that case decides that it is for the plaintiff to prove a clear, unequivocal acknowledgment by one partner, to take the case out of the Statute of Limitations, to charge his co-debtor. [BRADY, C. B.—Lord *Tenterden's* act takes away the principle as to acknowledgment by a co-debtor, but not the effect of payment.] *Tippetts v. Heane*(a) recognizes the former case; and *Whitcombe v. Whiting*(b) is not to be extended. This was not a payment of interest falling due within 20 years, and might have been a payment of interest which accrued more than 20 years before the filing of the bill; and it would be going too far to say that a payment, under such circumstances, should bind the defendant. This case is not concluded by *Warrens v. O'Shea*(c). [BRADY, C. B.—*Warrens v. O'Shea* was not a proceeding on a judgment—it was an action on a bond, and did not involve the question whether the statute 8 Geo. I. c. 4, was repealed by the late Statute of Limitations or not.] A payment on account would take the case out of either statute; but one person should not be charged by the action of another, except upon clear testimony. Now, it is admitted that *Thomas Going* was a banker at the time when this letter of 23rd September, 1820, was written; and it is too strong a presumption that there were no other dealings than this between him and *Newenham*. We were not bound to prove in the negative that there were no other transactions between *Going* and *Newenham*. [LEFROY, B.—The bill put in evidence distinctly the mode in which it was intended to take the case out of the Statute of

(a) 4 Tyr. 772.

(b) 2 Doug. 628.

(c) 5 L. R. N. S. 77.

Limitations, and of that you have full notice.] Under ^{1842.} the Bankers' Act, 33 Geo. II., c. 14, s. 6, all payments to a banker after stoppage of payment are actually ^{VINCENT} void; *Hayden v. Carroll*(a) and Lord *Clare's* judgment, pp. 590-3; and the Banker's Act is more stringent than the Bankrupt Act. *Brandram v. Wharton*(b) is a case of payment, and is treated as a case of acknowledgment. [BRADY, C. B.—That case went upon the fact of the proof being for a larger debt, (not identifying the bill,) but for goods sold and delivered; and therefore the Court could not say that the payment of the dividends was on fact of the bill of exchange.] There are express authorities that payment of dividends on foot of the debt by the assignee of a co-debtor takes the case out the Statute of Limitations with respect to the other co-debtor. Lord *Tenterden* was dissatisfied with the doctrine of *Jackson v. Fairbank*(c). [BRADY, C. B.—We must take it that the payment was by the trustees of the deed executed under the Banker's Act, or by *Going*, as their agent.] The principle of the case of *Brandram v. Wharton* is that if a partner cannot compel contribution from a co-contractor he cannot be affected by his acts. That was acted on in *Atkins v. Tredgold*(d); *Slater v. Lawson*(e) decides the converse, and these cases decide that, the joint liability being terminated, the acts of one co-debtor cannot affect the other. Here the act of bankruptcy put an end to the joint liability as well as the death of the party did in the other cases. The case of *Jackson v. Fairbank*(f) has been

(a) 3 Rid. P. C. 545.

(c) 2 H. Bl. 340.

(e) 1 B. & Ad. 396.

(b) 1 B. & Ald. 463.

(d) 2 B. & C. 23.

(f) 2 H. Bl. 340.

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disapproved of, and has been affected by the later case. With respect to the question of revivor, the second ground upon which the plaintiff relies as taking the case out of the statute, the revival was in *Trinity Term*, 1834; that was not until after the act passed. In *Irwin v. Ormsby*(a) Justice *Burton* held that the 3 & 4 Will. IV. repeals the 8 Geo. I. as to the effect of a *proceeding*. *Paget v. Foley*(b) illustrates the effect of an affirmative statute in repealing a prior statute if both be inconsistent in their nature. Thirdly, as to the effect of the acknowledgment: *Town v. Smart*(c) decides that the acknowledgment of the debtor must be of the debt and of the willingness to pay; *Brigstocke v. Smith*(d), per *Bayley, J.*; *Fearn v. Lewis*(e). Mr. *Willington* acknowledges his liability, but points out his peculiar position as a surety. [BRADY, C. B.—The words of the statute are “an acknowledgment of right thereto.” [RICHARDS, B.—Suppose the defendant said, I acknowledge the debt, but will not pay you?] I question whether that would do; but supposing it was an acknowledgment, the case of *Maddock v. Bond*(f) decides that at the time it was given it was worth nothing. The letter of *James Willington* which is relied on, is no proof of an acknowledgment, for it repudiates the debt; and admitting that *Maunsell* was the agent of *James Willington* in 1822, his act as agent could not bind his principal unless within the scope of his authority, but he would have committed a breach of his duty if he had acknowledged this debt to have been due by his principal.

(a) 2 Jebb. & S. 92.
(c) 6 B. & C. 603.
(e) 6 Bing. 349.

(b) 2 Bing. N. C. 679.
(d) 3 Tyr. 448.
(f) Ir. Term. Rep. 332.

Mr. *Moore*, Q.C., in reply.

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As to the first question, on the effect of the payment of interest, two objections are made—1st, it is not precise; but the letter of 16th March, 1820, clearly identifies it. The letter of 23rd September, 1820, refers distinctly to the joint bonds of *Going* and *Willington*. So here we have distinct acknowledgments of joint bonds for £4,000, and of the payment of interest. Now it is not at all necessary that it should be stated in black and white that the payment should be *ad idem*; but if the Court, like a Jury, is satisfied on what account the payment is made, that is sufficient. The case of *Brandram v. Wharton*(a) is not analogous to the case before the Court; in that case there was no statute declaring that part payment should take the case out of the Statute of Limitations; but from part-payment the inference of a promise was drawn; and all the Court says is, I will not draw an inference, unless you, who pay, are liable. But here there is a positive enactment that payment of interest shall take the case out of the statute; and all that is necessary is that the payment should be *bonâ fide*. If here there had been a *bonâ fide* payment, it does not signify whether *Going* was liable or not at the time of payment; but at that time it is said in one of the letters that Mr. *Going* had an estate of £4,000 a-year. With regard to the question of acknowledgment, there is no doubt as to that. The case of *Tanner v. Smart*, cited by Mr. *Smith*, does not apply; for here we have a clear acknowledgment of the right; it comes within the exception of the act of Parliament. Lord *Tenterden's* act

(a) 1 B. & Ald. 463.

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declares that the acknowledgment must amount to a promise. Mr. *Smith's* argument would make the statute wholly prospective. [BRADY, C. B.—The defendant claims the benefit of the act as being retrospective: must we not take it as retrospective with its liability?] The letter requesting that proceedings should be taken in the first instance against *Going* is a clear acknowledgment of the debt by Mr. *Willington*.

BRADY, C. B.—We are all of opinion that there must be a decree to account according to the prayer of the bill. The bill has been filed for an account of what was due for principal, interest, and costs, on foot of two judgments, for securing the sums of £3,000 and £1,000 obtained in Trinity Term 1815, by Colonel *William Vincent* against *John Willington* and *Thomas Going*. The defence set up by the defendant is the Statute of Limitations. The plaintiff has relied upon the fact, that within 20 years before the filing of the bill a payment was made on account of interest, and has proved that in 1820, Mr. *Going* paid £150 to the agent of Colonel *Vincent*, accompanied by a letter, stating that it was made on account of Colonel *Vincent's* interest. We think that letter sufficiently shows that the payment was on account of this interest. It is admitted that this payment takes the case out of both statutes, if *Going* was liable at the time of payment. But it is urged that in 1815, *Going* was a bankrupt, and that such payment was made by him as agent to his own trustees. That brings it within the case of *Jackson v. Fairbank*^(a), in which it was held that the payment of a dividend under

(a) 2 H. Bl. 340.

A commission of bankruptcy took the case out of the ^{1842.}
 Statute of Limitations, and that distinguishes it from the ^{VINCENT}
 case of *Brandram v. Wharton*(a); and, although in that ^{v.}
 case the Court doubted the case of *Jackson v. Fairbank*, I ^{WILLINGTON.}
 am not prepared to overrule it, as it is acknowledged in
Farleigh v. Stott(b). In that case Justice *Holroyd* says,
 "*Whitcombe v. Whiting* and *Jackson v. Fairbank* are in
 point, and must govern the present case." On these
 grounds, I am of opinion, that payment in this case has
 been sufficient to take the case out of the Statute of Limi-
 tations. It has been thrown out that the plaintiff will not
 rely on the revivor against *Going*, and I do not feel called
 upon to say more on that question, as it is pending before
 the Court on a bill of exceptions. With regard to the
 acknowledgment, I think it most clear and expressive, and
 that the statute is retrospective. The defendant has relied
 on it, and he must take it with all its incidents. Our
 decree is founded on the fact of payment by *Going*, whether
 as for himself or for those properly liable for whom he
 was agent(c).

(a) 1 B. A. 463.

(b) 8 B. & C. 36.

(c) PENNEFATHER, B., was absent.

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EQUITY
EXCHEQUER.
Sat. Jan. 15.

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A. being possessed of certain lands for a term of 21 years, under the see of D., demised them to A. L. and B. L. for 21 years, with a *toties quoties* covenant for renewal: A. L. and B. L. afterwards sold part of the lands, and made partition of the rest, each retaining for his share 16 acres. A. L. died, having bequeathed his share of his 16 acres to his two sons; the share of B. L. was afterwards sold to the plaintiff. Subsequently to this sale, the two sons of A. L. obtained, without the knowledge of the plaintiff, a renewal of the entire of the said lands in their own names, and mortgaged them to M., and brought an ejectment against the plaintiff. The defendant, an attorney, had prepared the mortgage, and acted as the attorney of the lessors of the plaintiff in the ejectment.

The plaintiff had filed a bill against the sons of A. L. and their mortgagee, and had obtained a decree in 1826 for an account and reconveyance against them. The defendant afterwards purchased the interest of the sons of A. L. in the premises, and paid off M.'s mortgage. After many attempts to effect a settlement of accounts and obtain a reconveyance from the defendant, the plaintiff, who was in distressed circumstances, signed an agreement, stating, that he had surrendered his holdings to the defendant, and agreeing to a reference to arbitration respecting a new division of the lands, and to take them at an increased rent. No actual surrender was proved, nor was any lease executed in pursuance of this agreement. *Held*, that there was no consideration for such agreement, and that the plaintiff was entitled to the benefit of the former decree against the defendant, and the latter was decreed to pay the costs.

partition, each retaining 16 acres. Some years afterwards *Andrew Lowry* died, having bequeathed his share of the said lands to his sons *Andrew Lowry* and *Alexander Lowry*, the younger, who, upon his decease, entered into possession of the share so bequeathed to them. The renewal fines for the lands of *Lisbane* were paid by the respective tenants to the lessor *John Knox*, and after his decease, to his son *Henry Waring Knox*, who, upon the death of his father, became entitled to the lessor's interest in the said lands. *Alexander Lowry*, the elder, remained in possession of his 16 acres until the year 1819, when his interest therein was sold under a *fieri facias* to the plaintiff in the original cause, *Thomas Patten*, and conveyed to him by the sheriff, by indenture, dated 31st May, 1819. The bill charged that *Alexander* and *Andrew Lowry*, the younger, who had held part of these 16 acres as undertenants to *Alexander Lowry*, the elder, being displeased with the purchase made by *Patten*, prevailed upon the tenants to refuse to attorn to him; he therefore brought ejectments against *Alexander* and *Andrew Lowry*, the younger, and the other undertenants of his part of the lands; and having got judgment by default, was put into possession; *Alexander* and *Andrew Lowry*, the younger, remaining in possession of the other 16 acres. Shortly afterwards, by lease, dated the 29th September, 1819, *Patten* demised to *Alexander* and *Andrew Lowry* 13 of his 16 acres for three years, at 32s. 6d. per acre.

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Some time before 1822, a bill was filed in this Court by some of the creditors of *Henry Waring Knox*, for the purpose of having certain charges raised and lands sold for payment of his debts, and a Mr. *Joseph Murphy* was

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appointed receiver in that cause. In consequence of *Henry Waring Knox* having gone to reside abroad, no renewal had been obtained by him from the Bishop, or by the undertenants of the lands from him until 1822, when *Murphy* was directed by the Court to obtain a renewal of the lease from the Bishop, which he did. When the renewal was obtained, the lease granted by *John Knox Alexander* and *Andrew Lowry*, the elder, had expired; but the plaintiff and other parties interested had paid the renewal fines payable to their lessor up to 1804. The receiver then wrote circular letters to the several tenants entitled to the benefit of the *toties quoties* covenant for renewal, calling upon them to come in and take renewal of their leases. The receiver was not aware of the changes which had taken place in the ownership of the interest under the lease of 1783, in the lands of *Lisbane*, and finding in the counterparts of the leases the names of the former tenants, addressed a letter to "*Andrew and Alexander Lowry, Lisbane*," an address intended for the original lessees, but corresponding to the names and descriptions of the defendants in the original suit. On receiving this letter, *Andrew* and *Alexander Lowry*, the younger, waited on Mr. *Murphy*, the receiver, and represented themselves as the parties entitled to the whole of the farm of *Lisbane*, under the original lease of 1783, and produced to him the lease of that date; and having paid the renewal fine charged for the whole farm, obtained a new lease to themselves, their executors, administrators, and assigns, dated 19th October, 1822, of all the said lands. On the same day they executed a mortgage of the whole of the said lands to a Mr. *James Murray* for a sum of £800. The plaintiff having heard that a renewal had been obtained from the

Bishop, applied to the receiver for a renewal to him of the lease of his part of the lands, when he was informed that a renewal had been granted of the whole farm to *Andrew* and *Alexander Lowry*, the younger. The plaintiff then called on them, and offered to pay his proportion of the renewal fees and all other charges, and required them to convey to him his sixteen acres, which they refused to do; and immediately afterwards *Patten* was served with an ejectment, at the demise of *Andrew* and *Alexander Lowry* and of *James Murray*. *Patten* took defence to this ejectment, and on 20th January, 1823, served a notice on the lessors of the plaintiff in the ejectment, offering to pay his proportion of the renewal fines; demanding a conveyance of his share of the lands, discharged of the mortgage, and threatening to file a bill in case of their non-compliance with these terms. Mr. *Wallace*, the defendant in the present cause, and acted as the attorney of *Murray*, the mortgagee, in preparing his mortgage, as well as for *Andrew* and *Alexander Lowry*, the younger; and the original bill charged that he had notice of the plaintiff's equitable title, and that when *Murray* remonstrated with him for allowing him to accept such a title, *Wallace* executed an indemnity to *Murray*. It was then agreed to refer the case to arbitration at the next *Downpatrick* assizes; the plaintiff was ready at the day appointed, but the defendants did not attend. *Andrew* and *Alexander Lowry*, the younger, and *Murray*, then proceeded with their ejectment, and had judgment therein. The plaintiff thereupon filed his original bill, praying an injunction to stay the ejectment proceedings, and that the renewal might be held to be in trust for the plaintiff, so far as related to his proportion of the lands. The defendants answered that bill, and on the 8th June, 1826,

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the cause was heard, when the Court pronounced a decree, that it should be referred to the Chief Remembrancer to take an account between the parties, and that *Andrew and Alexander Lowry* should execute to the plaintiff a re-conveyance of that part of the premises to which he was entitled; and that the defendants, *Andrew Lowry and Alexander Lowry*, and *James Murray*, should have and recover their costs in the said cause against the plaintiff, and that such sum as should be reported due by the defendants, *Andrew Lowry and Alexander Lowry*, should be set off against the costs thereby ordered to be paid to the defendants.

Shortly after this decree was pronounced, the plaintiff received from the defendants, *Andrew and Alexander Lowry*, a notice addressed to them by the receiver in the cause of *Scott v. Knox*, requiring them to renew their lease of *Lisbane*, and to pay him the sum of £57 13s. 9d., their proportion of the renewal fine reported to be due by them for the renewal of the lease of the premises for three years and an half, to the 1st November then last. Immediately after the receipt of this notice, the plaintiff paid to the defendant the sum of £18 2s., as his proportion of the renewal fines claimed by that notice, and received from him the following acknowledgment:—

“ Mr. Patten has handed me £18 2s. for the purpose of
 “ paying his proportion of the last renewal fine on the lands
 “ of *Lisbane*, which I will return if the said fine be not
 “ received by Mr. *Mecredy*,” (who was the solicitor for Mr. *Murphy*, the receiver.)

“ October 25, 1826.

“ *John Wallace*.”

In the following Michaelmas Term when the plaintiff is about to settle and make up his decree, and to have an account taken as thereby directed, he was informed

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Wallace that he had purchased the interest of the defendants, *Andrew* and *Alexander Lowry*, in the said lands, and had obtained from them a conveyance thereof; and that he had also obtained a reconveyance of the mortgage from *James Murray*; and that if the plaintiff would cease either to prosecute his suit, he, *Wallace*, would furnish him with an account of the proportion of the renewal fees, interest, and costs, payable by the plaintiff pursuant to the decree of 1826, and would forthwith furnish and tax the costs payable by the plaintiff under that decree; and would, in such account, allow the plaintiff all credits to which he was entitled under the decree for the value of his proportion of the lands while they were in the possession of *Andrew* and *Alexander Lowry*; and requested the plaintiff to pay him on account thereof in cash bills, £350 in addition to the £18 2s. already paid by the plaintiff to the defendant *Wallace*; and promised that he, *Wallace*, would immediately come to an amicable settlement with the plaintiff, of all the accounts directed to be taken by the decree, and would forthwith execute a proper deed of conveyance to him of his proportion of the lands. On the 4th December, 1826, the plaintiff paid *Wallace* £100 in cash, and gave him bills for £250, which the plaintiff duly paid when they became due, *Wallace* agreeing to allow the plaintiff £102 for two years mesne rates, which the plaintiff agreed to accept. This was not paid; and in March, 1827, after the payment of the last of the above mentioned bills, the plaintiff called upon *Wallace* at his office, and requested of him to come to a final settle-

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ment with him, and offered to pay *Wallace* any balance which might appear due to him, on his executing a conveyance to the plaintiff, pursuant to the before mentioned undertaking. *Wallace* upon this occasion said he could not then arrange his account or tax his costs, but would do so without delay; and said that he had prepared a draft deed of conveyance, pursuant to the decree, which he was ready to execute upon the plaintiff approving of it, and upon its being engrossed upon a proper stamp; he also required the plaintiff to purchase the stamp, which he did, and having paid for it the sum of £3, handed the same to *Wallace*, who promised to have the deed engrossed, and to execute it on the following Friday. The plaintiff attended at the defendant's office on that day, and requested him to execute such conveyance and to settle the accounts, but the defendant both then and on other subsequent occasions put off doing so on various pretences.

The plaintiff continued to pay the head rent to the defendant from the 1st November, 1826, to 1st November, 1833. The bill stated that in December, 1833, one *John Lowry*, the plaintiff's attorney in the original cause, having recovered a judgment against the plaintiff for the amount of the costs in that suit, and issued execution thereon, and threatened to sell the plaintiff's interest in the said lands, the defendant, *Wallace*, proposed to the plaintiff's son, *John Patten*, to take out the renewal of the lands in his name to defeat the execution, and procured a proposal from *John Patten* to make a proposal for a renewal or new lease of the land at an advanced rent: the plaintiff charged that he had never assented to or authorized such proposal. Since November, 1833, the head rent of the premises

regularly tendered by the plaintiff to the defendant, was refused; and an ejectment was brought by the defendant, in which the plaintiff gave a consent for judgment (having no defence at law) with stay of execution until the 22nd April following. The plaintiff on the 29th September, 1837, having served a fresh notice on the defendant, calling on him for an account and conveyance, having, on the 10th October, 1838, tendered to *Wallace* arrears of head rent, and again required a conveyance, on this bill on the 23rd April, 1839, praying to be decreed to have the benefit of the former suit and proceedings against the defendant *Wallace*, and to have the same relief against him as had been decreed against said *Andrew Lowry*, *Alexander Lowry*, and *James Gray*, and that the plaintiff might, if necessary, be at liberty to prosecute the accounts directed by the decree of June, 1826, so far as might be necessary to ascertain proportion of renewal fines, interest, and costs, payable to the plaintiff for his part of said lands and premises under said decree; and also in case the said *Wallace* should decline to adhere to his proposal of allowing the plaintiff a certain sum for the amount of mesne rates of lands so decreed to him, then to ascertain what the said *Andrew Lowry* and *Alexander Lowry* made, or with wilful default might have made, of the plaintiff's proportion of the said lands while they were in possession of the same, and that an account might be taken of the costs payable to the said defendants under the said decree, and the several sums of money paid to *Wallace* by the plaintiff, on account of renewal fines, interest, and costs; and that on payment of such balance, if any, as might appear to be due by the plaintiff on foot thereof, the said

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The defendant, *Wallace*, by his answer alleged, that the plaintiff, of his own accord, had proposed to him to take a lease from him at a rent of 30s. an acre, and to give up all claim which he might have to any renewal under the decree of 1826; but that he, *Wallace*, refused to comply with such proposal, unless the plaintiff would agree absolutely to surrender the said lands, so that the defendant might be enabled to make some alteration and change between him and *Alexander* and *Andrew Lowry* the younger, who occupied some of the lands adjoining, and he relied upon the following agreement, dated January 17, 1834:—

“ We, the undersigned, having surrendered our several
“ holdings in *Lisbane* to Mr. *Wallace*, from the 1st
“ November last, do hereby engage to stand to such award
“ between us, and to take such portion of the land again
“ as three persons, one to be named by the *Lowrys* and
“ one by *Patten*, and an umpire by Mr. *Wallace*, shall
“ ascertain. The majority to decide, if they can agree;
“ and if they cannot, then the umpire alone.

“ *Thomas Patten*.

“ *Alexander Lowry*.

“ *Andrew Lowry*.”

“ Present—*J. Nelson*.”

he arbitrators made their award, and allotted to the rent parties different portions of the lands; for one of the portions *John Patten*, the plaintiff's son, had made a proposal at 30*s.* an acre. The defendant, *Wallace*, also relied upon this advanced rent not having been tendered by the defendant, upon the alleged surrender; and, independently of the surrender, upon the plaintiff having by his acts destroyed his claim to a renewal.

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r. Holmes and *Mr. Lowry* for the plaintiff.

r. Gilmore, Q.C., Mr. Nelson, Q.C., and Mr. Hayes,
the defendants.

By the former decree the costs were ordered to be paid by the plaintiff, and it appears that when it was pronounced the court did not think it worth while to make it up, or to go on with the account. In all the cases between a trustee and a *qui trust*, the trustee has been trustee of an estate; here, at the utmost, the plaintiff had a mere right in the land. We contend that he has released by his agreement to take a lease of the lands from the defendant at an advanced rent, and by having sanctioned, as we contend he did, his son to make a proposal for the lands at an advanced rent.

BRADY, C.B.—In this case it is quite plain, that by the decree of this Court, in 1826, the plaintiff was declared to be the owner of these sixteen acres; and that the defendants, in that suit, were declared to be trustees for the plaintiff, and were bound to convey to him under certain terms; the present defendant stands in the place of these parties, as a purchaser of their interest, with full notice of the nature of

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it. It would be quite a matter of course to effectuate the former decree against the defendant; but it is alleged upon his part, that it is unjust that he should be bound by that decree, because he says, that the plaintiff, by a *parol* agreement, had consented to give up his interest in the property in question, and had agreed to take it as a tenant under the defendant, at an advanced rent of 30*s.* an *ann.* If this were supported by proper evidence, and had it appeared that the account between the parties had been gone into, and that *Wallace* had satisfied the plaintiff, by vouchers, that a large balance appeared against him, and that the plaintiff, with his eyes open, had consented to become tenant under a new agreement, that would have been an arrangement to which the Court would lend its sanction, but nothing of the kind is proved—no account is given; the £350 goes into the pocket of the defendant, and there is no account of that; nothing to show the Court that it was due. That being so, no consideration was shown for entering into the agreement, only loose conversations are alleged. Looking at the whole of the case, the Court is satisfied that *Wallace* had not made himself owner of the property against the plaintiff, and put him at arms length. By the decree, made in 1826, the other parties were made trustees for the plaintiff, and *Wallace* having bought their share with full notice of that, we cannot suffer him to take advantage of his position with respect to the plaintiff. I am therefore of opinion, that *Wallace* is a trustee of this property for the plaintiff, and that we are bound to give the plaintiff the benefit of the former decree; I think the account specified by the former decree must be taken, and that *Wallace* must give an account of what he has made, or without wilful default,

might have made, of the premises ; and I think he must pay the costs of this suit.

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RICHARDS, B.—I feel myself bound to say, in addition to what has fallen from the Lord Chief Baron, that *Wallace* has taken an unconscionable advantage of this poor man. He was attorney for the defendants in the former suit ; he then takes an assignment of their interest and of the mortgage ; having then the legal estate, he seeks unjustly and unfairly to take from the plaintiff the benefit of that decree. And on what grounds does he seek to do so ? He says, the defendant promised by parol to give up these sixteen acres, and to take a new lease of them at 30s. an acre. Now, this is a mere parol agreement, without consideration, doubtfully proved to have taken place between the parties. But even if Mr. *Wallace*, under the circumstances, had coerced this man to have entered into such an agreement, I, for one, would go the length of saying that it ought to be set aside. I concur therefore with the Lord Chief Baron that the plaintiff should have the benefit of the former decree, and should pay the costs of this suit.

LEFROY, B.—In addition to the opinions already delivered by the Lord Chief Baron and Baron *Richards*, I shall only add, that the very evidence of the agreement on which the defendant relies, shows it to be conditional, that the plaintiff should be paid for his improvements and should get a new lease, neither of which conditions have been complied with. I therefore agree with the other members of the Court.

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Mon. Jan. 17.

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F. had obtained two judgments against N., and died in 1834, having bequeathed all his property, real and personal, to his niece A., the sister of N., whom he appointed his executrix. The judgments were revived in 1841, and A. was about to enforce payment of them when, on a promise of a grant of an annuity from N., and threats of legal proceedings, A., who was a person 66 years of age, and unacquainted with business, executed warrants of attorney to satisfy the judgments without having consulted her legal adviser. The annuity deed was not executed till after the warrants. Satisfaction was entered by virtue of the warrants.

Two judgments, one for £540 another for £60, had been entered, by warrants of attorney, the one in 1828, the other in 1830, against Mr. *Nuttall*, the defendant, at the suit of his uncle, General *Freeman*, who died in 1834, having bequeathed all his property, real and personal, to the plaintiff, his niece, Miss *Nuttall*, sister of the defendant, her executors and administrators. General *Freeman* appointed the plaintiff his executrix, and she obtained probate of his will. In 1841, the plaintiff obtained judgment of revivor, by *scire facias*, on these two judgments, and was proceeding to enforce payment of them, when on the 7th December, 1841, she was induced to execute warrants to satisfy them. It was sworn that the plaintiff, when she executed these warrants, was a person of 66 years of age, of a nervous temperament, and unacquainted with business, and that she was induced to execute them in the absence of her attorney, though she required time to submit them to him. At the time when the warrants to satisfy were executed, there had been an understanding that she was to receive an annuity in lieu of the judgment debts. The deed, purporting to grant this annuity, did not effectually bind the grantor's real estate, but only secured the payment by his personal covenant, and was not executed until after the execution of the warrants to satisfy. Satisfaction of

Held, that the Court had an equitable jurisdiction to set aside the satisfaction.

the judgments was accordingly entered upon the roll in pursuance of these warrants.

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Fitzgibbon, Q.C., with whom was *Rolleston*, for the plaintiff, now moved that the satisfaction thus entered should be vacated. The motion had been already made in Chamber before the Lord Chief Baron, who directed the case to stand over for the full Court. There were long affidavits filed, in which there were several conflicting statements made on both sides, both as to the intention of *General Freeman* to enforce these judgments, and as to the circumstances of the agreement between the plaintiff and defendant for the grant of the annuity.

On *Fitzgibbon* now making his application, the Lord Chief Baron intimated a doubt, whether the Court had jurisdiction to make this order in respect of a warrant of attorney to satisfy judgments.

Fitzgibbon.—The warrant is a direction to an officer of the Court, and the Court has, undoubtedly, full jurisdiction in cases like the present; though I have found no case exactly in point, there are several which involve the same principle; *Duncan v. Thomas*(a); *Doe v. Franklin*(b); *Harrod v. Benton*(c); the last is a strong case, and shows that the Court will go nearly as far as a Court of Equity in cases; *Martin v. Martin*(d) goes even farther than we require; *Cox v. Rodbard*(e); *Cooke v. Jones*(f); *Anonymous*(g).

(a) 1 Dougl. 196.

(c) 8 B. & C. 217.

(e) 3 Taunt. 74.

(g) 2 Lord Kenyon, 294.

(b) 7 Taunt. 9.

(d) 3 B. & Ad. 934.

(f) Cowp. 728.

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The Courts of common law have ever exercised an equitable jurisdiction over their own judgments; and if they have an authority over warrants to enter judgment, why should not they have authority also over warrants to satisfy them? There is a case in point, *Bateman v. Ramsay* (a), in which it is said the Court of Common Pleas set aside a warrant to satisfy a judgment, as having been obtained by fraud [RICHARDS, B.—As I understand that case, the warrant was a nullity, the bond and warrant having been given to a married woman].

Hatchell, Q.C., and *Butt*, for the defendant.—If the plaintiff has any case at all, it is a case for a Court of Equity; and the Court has never interposed its summary jurisdiction in case of a warrant to satisfy a judgment. The Courts have adopted different rules between warrants to enter and those to satisfy judgments: it was required that an attorney should be present at the execution of a warrant, by a prisoner, to enter judgment, but not so in case of a warrant to satisfy (b). The act 3 & 4 Vict. c. 105(c), recognizes the same distinction. The Court in the one case exercises a judicial act, and the entry accordingly is, “it is considered by the Court,” and the Court ought to inquire into the circumstances, and set the warrant aside, if improperly obtained; the entry of satisfaction, is the act of the party himself. [BRADY, C.B.—We have examined the entry on the record, and find that the form of entering satisfaction thereon, equally imports a judicial act.] As a general principle all warrants of

(a) *Sausse & Sc.* 459.

(b) *R. G.* 38 Yeo. N. R. 56.

(c) Sect. 10, 11.

orney are revocable, except a warrant to enter judgment, which is not so; this is another distinction between it and warrant to satisfy; 1 Tidd. Pr. 550. It is remarkable that from the year books to the present day, no case has been cited in support of this exact position, for the case of *Steman v. Ramsay* is not applicable.

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[BRADY, C.B.—I have discovered a case of a satisfaction and a judgment set aside in a case of forgery, in *Barnardis's Reports*, *Wilson v. Charlesworth(a)*.]

BRADY, C. B.—This case has occupied a great deal of me—I will not say it has done so unnecessarily, for it involves a question of great importance to the public as regards the jurisdiction of the Court, and to the parties concerned, both as regards the amount of the matter in dispute and the professional character of some of those engaged in it; we have, therefore, been anxious to have it fully discussed. When the case was originally brought before me in chamber, I felt it involved these points, and was anxious to have the assistance of the full Court. (Here his Lordship made some remarks on the peculiar circumstances of the case.) It was strongly urged on the part of the defendant that the Court had no jurisdiction to make the order sought for, but I was unable to see any real distinction in this respect between a warrant of attorney confess and one to satisfy a judgment; and on examining the roll and investigating the principle of the thing, I think the two sorts of warrants are not distinguishable and one is as much an act of the Court as another; one is

(a) 1 Barnardis. 320.

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a judgment against a party—the other is a judgment for him. In *Wilson v. Charlesworth* the Court treats the entry of satisfaction as a judgment. On principle, therefore, and on the authority as well of that case as of the case in *Sausse and Scully*, I feel fully satisfied that we have jurisdiction to deal with this judgment, and that we have authority to set it aside, if obtained by fraud or on improper grounds; and it would be most improper, in my mind, if the Court had not that primary jurisdiction. Both on principle, then, and on authority, I am, after some doubt, of opinion, that we have authority to exercise that jurisdiction. With regard to warrants to enter judgment, it was a rule of the Court that an attorney should be present at the execution of them by any person in custody on ~~some~~ process. I do not say that is a rule applicable here; but we cannot have a more important element in this case than that this lady did apply for time to submit these documents to her attorney, who was known to be so, and that ~~that~~ demand was not yielded to. When she said she ~~wished~~ to show them to her attorney, that demand ought to have been immediately acquiesced in. It appears this lady was a person who, if allowed to consult her friends, would be influenced by them, as she was likely to be influenced by those about her. I do not think she was properly treated. If she, knowing her rights, and *bonâ fide* meaning to compromise them, had agreed to take an annuity, and if this had been effected, I would be slow to interfere; but is this the arrangement she has entered into? She must have understood that the annuity which she was to receive was to be bound upon the property; but there is only a personal covenant for the payment of it. Therefore, being of opinion that these warrants were obtained prematurely, and

not being satisfied that she ever did execute them with the full professional advice which she ought to have had, I think the satisfaction ought to be set aside, and set aside with costs.

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Barons RICHARDS and LEFROY concurred. Baron PENNEFATHER was absent.

SCOTT v. FRAYNE.

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OF PLEAS.
Wed. Jan. 19.

DWYER for the defendant, an attorney of the Court, applied for the discharge of the defendant from custody in the prison of *Wicklow*, under the following circumstances, detailed in the defendant's affidavit, which stated that on the 4th January instant the defendant went to *Baltinglass*, in the county of *Wicklow*, to attend the quarter sessions there, after having just attended professionally at *Wicklow*; and that he so attended the said Court at *Baltinglass* on the 5th and 6th days of January instant in his professional character as an attorney, where he was then engaged amongst other matters, in a case of the *Queen v. Burke*, on behalf of the traverser *James Burke*. The trial did not come on either on the 5th or 6th January, but stood over until the 7th January, and immediately before the sitting of the Court, and as the deponent was going in the direction thereof, he was arrested at the plaintiff's suit, on a warrant grounded on a *ca. sa.*, issued from this Court, and marked for the sum of £41 14s. 4d. On his being arrested the defendant sent for the sub-sheriff, who was passing through the street, and remonstrated with him

An attorney who has gone the circuit of quarter sessions is not entitled to be discharged from arrest under a *ca. sa.* upon an affidavit which states that he was engaged for a traverser in a certain case on the criminal side of the court of quarter sessions, and that he "was going in the direction of the court" (which was then sitting) when he was arrested. *Semb.*: The 65th & 68th sections of the Stamp Act, 56 Geo. III. c. 56, do not apply to an attorney practising on the criminal side of the court of quarter sessions.

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on the impropriety of his being arrested while in the discharge of his duty attending sessions, and requested liberty to go into Court, where the assistant barrister was then sitting, in order to apply personally for his discharge. The sub-sheriff refused, and the defendant was taken to *Wicklow* gaol. It appeared also that the defendant had a certificate for the year ending 6th January instant, but had not taken out a new certificate for the current year.

Dwyer.—The defendant must be discharged from custody. He was attending upon the Court and had gone the circuit of the quarter sessions to the other towns of the district, and when arrested was on his way to the Court to defend his client. He was certainly privileged from arrest.

R. Martin, for the plaintiff, *contra*.—The defendant is not entitled to his discharge, for he had not a certificate which was in force on the morning of the day when he was arrested. An attorney who has not taken out his certificate is not entitled to be discharged from arrest on ~~mere~~ process; *Anonymous*(a). *Sandes v. Concanen*(b) does not apply to this case. *Dyson v. Birch*(c), *Brooke v. Bryant*(d), show that the defendant, not being certificated, is not privileged from arrest. [BRADY, C.B.—There appears to be some distinction made by the 65th section of the Stamp Act(e)

(a) 2 L. R. N. S. 15.

(b) *Hayes*, 112.

(c) 1 B. & P. 4.

(d) 7 T. R. 25.

(e) 56 Geo. 3, c. 56, s. 65, enacts "that every person admitted, sworn, enrolled, and registered as a solicitor or attorney, or as a proctor, agent, or procurator, in any of his Majesty's Courts in *Dublin*, or in any Ecclesiastical Court, or in any Court of Admiralty in *Ireland*, or in any other Court in *Ireland* holding plea where the debt or damage

between Courts of a civil and criminal jurisdiction. The words of the 65th section are that every person admitted, sworn, enrolled, and registered as a solicitor, or attorney, proctor, &c., "in any of his Majesty's Courts in *Dublin*, "or in any Ecclesiastical Court, or in any Court of "Admiralty in *Ireland*, or in any other Court in *Ireland* "holding plea, where the debt or damage doth amount to

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"doth amount to forty shillings or more, shall annually, before he shall commence, carry on, or defend any action, suit, or proceeding whatsoever, in any of the said Courts, deliver, or cause to be delivered, to the Commissioners of Stamp Duties, or to some officer or officers appointed by them for that purpose, at the Stamp-office in *Dublin*, a paper or note in writing containing the name and usual place of residence of such person, and stating whether he has been so admitted three years or not; and thereupon, and upon payment of the duties which shall then be by law imposed on him as such solicitor, attorney, proctor, agent, or procurator, according to the time he has been admitted, as stated in such paper or note in writing, every such person shall be entitled to a certificate duly stamped, to denote the payment of the said duty by him, describing him in such certificate according to the description contained in the said note so given in by him, which certificate the said Commissioners, or such person or persons as shall be appointed by them for that purpose, shall cause to be immediately issued, under the hand and name of the proper officer, in such manner and form as the said Commissioners shall direct."

S. 68, enacts, "that if any person shall, in his own name, or in the name of any other person or persons, sue out any writ or process, or commence, prosecute, carry on, or defend any action, or suit, or any proceeding, as an attorney, or solicitor, proctor, agent, or procurator, in any of the Courts aforesaid, without having obtained such annual certificate, which shall then be in force, or without having caused the matters therein stated to be entered in such Court in such manner as hereinbefore is directed, or shall deliver to the Commissioners of Stamp Duties, or to the officer to be appointed by them for the purpose of issuing, granting, or registering such annual certificate, any false or fictitious place of residence, or any false or fictitious statement of his having been admitted an attorney, solicitor, proctor, agent, or procurator, or of the time when he shall have been so admitted, every such person shall for every such offence forfeit and pay the sum of £100, and shall be, and is hereby made, incapable to maintain or prosecute any action or suit in any Court of Law or Equity, for the recovery of any fee, reward, or disbursement, on account of prosecuting, carrying on, or defending any such action, suit, or proceeding."

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“forty shillings or more,” shall annually take out his certificate, as directed by that section ; and the 68th section enacts that if any person shall sue out any writ or process, or carry on, or defend any action “*in any of the Courts aforesaid,*” without having obtained his annual certificate, he shall forfeit £100, &c. This defendant was engaged as attorney for a traverser at the quarter sessions : now, upon the 65th section, he would not be liable for practising at the Court of Quarter Sessions—I mean at the criminal side of it. There might be a question whether he would be entitled to practice at the civil side of it ; but with regard to the criminal jurisdiction of that Court, I do not think the defendant comes within these two sections.] In *Newton v. Constable*(a) it was held that a barrister, while engaged on the quarter sessions circuit, is not privileged from arrest while attending a Court of Petty Sessions unless previously retained. The affidavit is not sufficiently explicit. There is nothing in it to show the nature of the case in which the defendant was employed, nor does he swear that he was retained by *Burke* in the case he refers to. He says, only, that he was going “in the direction of the Court” when he was arrested. In *O’Neill’s* case(b) it is decided that an officer of the Court is privileged from arrest while going to Court, tarrying, and returning ; but it does not appear that this person was going to the Court, or to defend the traverser. A solicitor who happens to be upon his own business on his way to Court is not privileged from arrest ; *In re Mahon*(c). In *Egan’s* case(d) the party was proceeding to attend his professional duties.

(a) 1 Gale & Dav.

(c) 1 Legal Reporter, 193.

(b) 1 Sausse & Sc. 78.

(d) 1 Legal Reporter, 28.

Dwyer.—The meaning of the affidavit is, that he was going to the Court in the discharge of his duty; the Court will allow the case, at all events, to stand over for a further affidavit.

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RICHARDS, B.—That *may* be inferred from the affidavit, but we are not bound to infer it. I do not think we ought to encourage the party to make a new affidavit.

BRADY, C. B.—This motion must be refused with costs, on the grounds that the party applying for his discharge has not shown that he was going to attend his professional duty when he was arrested.

Motion refused, with costs.

MANDERS v. MANDERS.

SIKES, Assignee of MANDERS v. MANDERS.

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EXCHEQUER
OF PLEAS.
Thur. Jan. 20.

By indenture of lease, dated 1st August, 1823, John A. in 1824 had executed, Joseph Duckett and Joseph Fade Duckett, demised certain on the same day, a mortgage for premises at Cullen's Wood, near Dublin, to Humfrey £2,000 of certain lands, and a voluntary settlement of the same lands, and had become insolvent in 1829, and a bill was filed in 1839, for a foreclosure of the mortgage, which prayed an account and sale, and that the surplus proceeds should be invested in the funds upon the trusts of the settlement. The assignee of the mortgagor filed a cross-bill, to have the voluntary settlement set aside, as fraudulent. It appeared that the mortgagor had been indebted at the time of the execution of the settlement to the amount of £87.

Held, that the Court would not, under such circumstances, direct an inquiry as to the amount of the debts of the settlor at the time of the execution of the settlement, and the cross-bill was dismissed with costs. Per LEFROY, B.—A voluntary settlement will be supported, unless the party making it is substantially indebted almost to the amount of insolvency.

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by *Stephens v. Olive*(a). Nor are there any grounds for directing any inquiry to what amount *Edward Mander* was indebted at the time of the execution of the settlement. If it were proved, or if it appeared upon the insolvent's schedule, (though the schedule itself might not be evidence against the parties claiming under the settlement) that *Edward Manders* owed a large sum over and above the amount of the money he raised, it might be otherwise; but under the circumstances of the present case, we do not think any such inquiry should be directed. The case of *Lush v. Wilkinson*(b) proves that in order to impeach a settlement after marriage as fraudulent, the husband must be proved to have been indebted at the time when the settlement was made, so as to have been in insolvent circumstances. On these grounds I am of opinion, that the cross-bill must be dismissed, and dismissed with costs.

RICHARDS, B., concurred.

LEFROY, B.—The principle upon which an inquiry is directed is laid down in *Kidney v. Coussmaker*(c). In that case an inquiry was sought, and Sir Wm. Grant granted the inquiry, because the settlement had come out in the first case upon the answer; the plaintiffs had no opportunity of questioning that settlement—there was none of doing so before; Sir Wm. Grant therefore gave the inquiry.

In the case before us, I not only concur with my Lord Chief Baron that the cross-bill must be dismissed, and an inquiry refused, but I can see no answer to the question,

(a) 2 Bro. C. C. 90.

(b) 5 Ves. 384.

(c) 12 Ves. 136.

how is this cross-bill sustained, which has no object but to set aside the settlement? It does not impeach the mortgage; but it is said that because the original bill prayed an investment of the surplus fund upon the trusts of the settlement, it became necessary to file the cross-bill. This was a mere speculation; and on that ground, as well as on the failure of any proof to support the case made by it, I am of opinion that the cross-bill must be dismissed, and dismissed with costs.

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Decree accordingly.

Lessee DEMPSEY v. NOLAN.

1842.
Mon. Jan. 24.

WALKER moved for a conditional order for judgment as in case of nonsuit, more than three terms having elapsed since defence taken.

In ejectment cases in this Court, judgment as in case of non-suit, cannot be had until three terms have elapsed after the second declaration filed, issue not being joined until then.

Fearon, contra.—In ejectment cases in this Court, issue is not considered joined until the second declaration is filed. He should have entered a rule for “*non pros*,” Lessee *Allen v. Trant*(a).

BRADY, C. B.—The cause is not at issue in this Court until the second declaration is filed. The case just cited is misconceived, and the word “nonsuit” used instead of “*non pros*.”

Motion refused, with costs(b).

(a) 1 C. & D 116.

(b) The practice of obtaining judgment as in case of nonsuit when the plaintiff has neglected to bring his cause to trial, is founded on the statute

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Manders, his executors, &c., for a term of years, at the yearly rent of £140, with a covenant enabling the lessor to fine down the rent to £80 a year, on payment of £800 as therein mentioned. *Humfrey Manders*, the lessee, by indenture of 18th May, 1824, in consideration of £1,200, assigned his interest in the premises to *Edward Manders*, his executors, &c., for the then residue of the said term. *Edward Manders* had been married in 1823, to his relative *Ann Manders*, and the sum of £1,200 paid by him for the interest of *Humfrey Manders* in the premises was part of the marriage portion of *Ann Manders*. In 1824, *Edward Manders* having occasion for a sum of money applied for a loan of it to his brother-in-law, *Robert Manders*, (the brother of *Ann*) who consented to advance him a sum of £2,000 on a mortgage of these premises, upon which *Edward Manders* had built some houses and made other improvements; but in order to make some provision for *Ann Manders*, it was required by *Robert Manders*, and agreed to, that the premises should be settled on her and her children. Accordingly by indenture, dated 2nd September, 1824, *Edward Manders* conveyed the said lands to trustees, named *Malone* and *Shelly*, in trust for *Edward Manders* for 99 years; remainder to *Ann*, his wife, for her life; remainder to the issue of the marriage as therein mentioned; remainder to *Edward Manders*, his executors, &c. By this deed the trustees were empowered to raise £2,000 and to pay £800 thereof as a fine to reduce the rent, the remaining £1,200 to be paid to *Edward Manders*. By another deed executed upon the same day, the trustees, *Malone* and *Shelly*, assigned the said premises to *Robert Manders* (the plaintiff in the original cause) in mortgage, subject to redemption, on payment of £2,000 and interest. The rent was accordingly fined down; and by indenture

f 18th September, 1824, the landlord, *Duckett*, reduced the rent of the premises to £80 pursuant to the covenant in that purpose contained in the original lease. By another deed of 12th July, 1827, *Edward Manders* mortgaged his life estate in the premises to *Robert Manders* for £1,300, subject to an annuity of £100 to be paid to *Edward Manders* for his support. On the 19th May, 1828, *Edward Manders*, in consideration of a further sum, conveyed his right to this annuity to a trustee for the plaintiff. *Edward Manders* became insolvent, and was discharged under the Insolvent Act, in 1828. The original bill was filed by *Robert Manders* for a foreclosure of the mortgage of 2nd September, 1824, and prayed an account and sale; and that out of the proceeds of the sale of the premises *Robert Manders* might be paid such money as should be found due to him, together with interest thereon, and his costs in the cause; and that the surplus profits, if any, should be invested in government stock and transferred to the accountant-general to the credit of the cause, on the uses of the deed of settlement of 2nd September, 1824, or upon such other uses as the Court should direct, and to be disposed of as the Court should order. This bill was filed on 13th November, 1838, before any assignee of the estate of *Edward Manders* had been appointed. The assignee of *Edward Manders*, who was appointed in 1839, filed a cross bill, stating that *Edward Manders* was at the time of the execution of the mortgage and settlement of 1828, indebted to a considerable amount for the materials of certain houses built by him upon the premises, which materials, it was stated, he had purchased on credit, and charged that being a distressed and insolvent person he executed those deeds for the purpose of defrauding his

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creditors : it also charged *Robert Manders* with wilful default as having been in possession of the premises since 1828, and having suffered *Edward Manders* to remain in possession of a dwelling-house upon them : it prayed that the deed of the 2nd September, 1824, should be declared voluntary, fraudulent, and void, so far as the same limited, or purported to limit, the premises comprised therein to the use of *Ann Manders* and the children of *Edward Manders*, and that the premises might be declared free and discharged therefrom ; and that the plaintiff in the cross-bill might be at liberty to redeem the premises from the mortgage debt due to *Robert Manders*, and that an account might be taken of what was due by *Robert Manders* for money lent or advanced by him on the security of the said premises, and of the rents, issues, and profits received by *Robert Manders*, or by any person or persons by his order or for his use, or which without his wilful default or neglect he might have received since he entered into possession, or into receipt of the rents, issues, and profits of the said premises, the plaintiffs offering to pay what was due in respect of the sums so advanced, and interest thereon, and that all proper accounts might be taken ; and that if *Robert Manders* had received more, he might be decreed to repay the surplus with interest ; and that the trustees might be decreed to re-convey the estate, free from incumbrances, with title deeds, leases, and muniments. It appeared that *Edward Manders* had, after the mortgage and before his insolvency, expended a large sum in improving the premises, and there was evidence that *Robert Manders* had received the rents and profits of the premises since 1828, and that he had permitted *Edward Manders* to occupy a house upon the premises.

Mr. *Brewster*, Q.C. and Mr. *George* for the plaintiff in the original cause.

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With respect to the mortgage cause, the plaintiff is clearly entitled to an account; but the cross-bill charges that the mortgagee has gone into possession, and has been guilty of wilful default in suffering *Edward Manders* to remain in possession. Now, a mortgagee is not bound to go into possession of the mortgaged property, but may go into possession of as much or as little of it as he likes. The cross-bill should be dismissed, for the assignee of *Edward Manders* can have a right to sustain it only so far as he seeks to charge *Robert Manders* as mortgagee in possession.

Mr. *T. B. C. Smith* and Mr. *Maley* for the plaintiff in the cross-cause.

Robert Manders was in possession at the time when *Edward Manders* was discharged as an insolvent: the whole transaction was a mere device of *Robert Manders* to cover the property for his sister from the creditors of *Edward Manders*. We do not seek to impeach the mortgage; but with respect to the wife and children, it is perfectly clear that the settlement of 1824 is voluntary. There is no evidence of any payment of the consideration money mentioned in the various deeds, except so far as the £800 by which the head rent was purchased up; and we allege the settlement is impeachable, for in the first place, the connexion between the parties shows the nature of this transaction, and in the next place, we have given evidence of *Edward Manders* having been indebted at the

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time when the settlement was executed. We impeach this deed as a fraud, not only on the statute 10 Chas. 1. s. 1, but on the insolvent laws; but in case the evidence we have adduced, as to his being indebted, should not be thought sufficiently precise, we are at all events entitled to a reference to ascertain how far *Edward Manders* was indebted at the time of the execution of the settlement of 2nd September, 1824.—*Townsend v. Westman*(a). [LEFROY, B.—The tendency of the cases is, that a voluntary settlement will be supported, unless the party making it is substantially indebted almost to the extent of insolvency.] [BRADY, C. B.—You must go so far as to show that the settlor was indebted to a greater amount than £1,200.] The original bill prays that the surplus of the sale should be invested in stock to the credit of the cause upon the trusts of the settlement. It is a suspicious thing that it should not only pray an account, but also that it should seek to get the money away from the creditor. The assignee could not have a full investigation of the case without this cross-bill.

Mr. Martley, Q. C., for the wife and minor children of *Edward Manders*.

The cross bill should be in the nature of a defence to the original bill. This original bill only prays an account, and an investment of the surplus *in usum jus habentium*. This could be done on the usual account; a cross bill was, therefore, unnecessary. The deed of 1824, recites that the settlement is made in consideration of the wife's fortune.

(a) 2 Beav. 345.

Now, a settlement made in consideration of money already paid is not voluntary. [RICHARDS, B.—I do not think that recital evidence at all]. At all events, in order to impeach the deed as fraudulent against creditors, the debts of the settlor, at the time of the execution of the deed, should be shown to amount to insolvency, which has not been done; the cross-bill must be dismissed, and the surplus of the sale invested on the trusts of the settlement.

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BRADY, C.B.—In the original cause there must be the usual decree to account, and the defendant *Manders* must account for what he has received, or without wilful default might have received, from that part of the premises of which he has entered into possession. This disposes of the original cause; but a cross-bill is sought to be sustained, because the plaintiff, in the original cause, has prayed that the surplus fund, after payment of the mortgage, ought to be invested upon the trusts of the settlement of 1824. It appears, however, that he merely sought what the decree of the Court would have done for him. I do not think a satisfactory case has been made on behalf of the assignee of *Edward Manders*, who is the plaintiff in the cross cause. It is alleged that *Edward Manders* was, at the time when the settlement of 1824 was executed, indebted to several creditors in a large amount; but the only evidence upon that subject is that of one of his creditors, who says, that he thinks *Edward Manders* was then indebted to him the amount of £87. That debt, if it ever existed, is but a single debt, and a single debt of that amount would not be sufficient reason for holding the settlement to be fraudulent. If the debt was secured by a mortgage, the settlement was good, as has been decided

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by *Stephens v. Olive*(a). Nor are there any grounds for directing any inquiry to what amount *Edward Mander* was indebted at the time of the execution of the settlement. If it were proved, or if it appeared upon the insolvent's schedule, (though the schedule itself might not be evidence against the parties claiming under the settlement) that *Edward Manders* owed a large sum over and above the amount of the money he raised, it might be otherwise; but under the circumstances of the present case, we do not think any such inquiry should be directed. The case of *Lush v. Wilkinson*(b) proves that in order to impeach a settlement after marriage as fraudulent, the husband must be proved to have been indebted at the time when the settlement was made, so as to have been in insolvent circumstances. On these grounds I am of opinion, that the cross-bill must be dismissed, and dismissed with costs.

RICHARDS, B., concurred.

LEFROY, B.—The principle upon which an inquiry is directed is laid down in *Kidney v. Coussmaker*(c). In that case an inquiry was sought, and Sir Wm. Grant granted the inquiry, because the settlement had come out in the first case upon the answer; the plaintiffs had no opportunity of questioning that settlement—there was none of doing so before; Sir Wm. Grant therefore gave the inquiry.

In the case before us, I not only concur with my Lord Chief Baron that the cross-bill must be dismissed, and an inquiry refused, but I can see no answer to the question,

(a) 2 Bro. C. C. 90.

(b) 5 Ves. 384.

(c) 12 Ves. 136.

his cross-bill sustained, which has no object but to e the settlement? It does not impeach the mort- out it is said that because the original bill prayed tment of the surplus fund upon the trusts of the nt, it became necessary to file the cross-bill. This ere speculation; and on that ground, as well as on re of any proof to support the case made by it, I pinion that the cross-bill must be dismissed, and d with costs.

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Decree accordingly.

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ER moved for a conditional order for judgment as of nonsuit, more than three terms having elapsed fence taken.

In ejectment cases in this Court, judgment as in case of non-suit, cannot be had until three terms have elapsed after the second declaration filed, issue not being joined until then.

n, contra.—In ejectment cases in this Court, issue nsidered joined until the second declaration is filed. uld have entered a rule for “*non pros*,” Lessee *Trant(a)*.

y, C. B.—The cause is not at issue in this Court ; second declaration is filed. The case just cited nceived, and the word “nonsuit” used instead of os.”

Motion refused, with costs(b).

(a) 1 C. & D 116.

; practice of obtaining judgment as in case of nonsuit when the as neglected to bring his cause to trial, is founded on the statute

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26 Geo. III., c. 31, s. 2. That statute, after reciting "the great inconveniences which arise to defendants in actions brought against them by plaintiffs delaying the trial of the causes, after issue joined between the parties," enacts, "that where any issue is or shall be joined in any of his Majesty's Courts of Record, and the plaintiff or plaintiffs shall neglect to bring such issue to be tried according to the course of such Court respectively, it shall be lawful for the judges of the said Courts respectively, upon motion made in open Court by the defendants in such action, or one of them, if there be more than one, due notice having been given thereof, to give the like judgment, and award costs in every such action or suit, as in cases of nonsuit, unless the said Court shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff or plaintiffs shall neglect to try such issue within the time so allowed them, the Court shall proceed to give judgment and award costs to the defendant, as in case of a nonsuit."

The practice thus originated by the statute may be briefly discussed under the natural heads, indicated by the several branches above given in italics, viz.:—First, As to issue being joined, and to what actions the statute applies; second, what is a neglect to bring the case to trial, according to the course of the Court; third, the mode of obtaining the conditional order for judgment as in case of nonsuit; fourth, upon what terms it will be discharged, and the plaintiff allowed further time to try the issue.

First—The issue must be joined, for until that be done, it is irregular to serve notice of trial; there cannot be a neglect to take to trial an issue not joined. In ordinary actions the issue is considered as joined when the pleading rightly concludes to the country, at least for the purpose of serving notice of trial; *Smith v. Rigby*, 3 Dow. 76. In ejectment cases in the Courts of Queen's Bench and Common Pleas, issue is considered joined for all purposes of trial, or of judgment as in case of nonsuit, when defence has been taken; *Lessee O'Herly v. M'Carthy*, S. & B. 75; *Lessee M'Ubre v. Wightman*, 5 L. R. N. 8. 283; *Loveland v. Summers*, 1 Smythe, 193. The principal case decides the practice of the Court of Exchequer to be different, and that issue in ejectment cases is not, by that Court, considered joined, until the second declaration has been filed, and the formal plea authorised by the defence has been added; *Moore and L. 24*. This peculiarity of practice, which is recent in origin, (Smythe, 193,) is rather at variance with the office practice of permitting, if judgment be not marked, defence to be taken up to the last day of serving notice of trial, although the rule for judgment has expired, which, notwithstanding the judgment of the Court on its impropriety, when it was discussed before them, still continues. This latter practice evidently arose from considering issue to be joined when defence is taken; but there is no reason for continuing it, when it is held issue is not joined until the second declaration is filed, and still less for upholding it after it was pronounced wrong in *Lessee Stephenson v. Cream*, 3 L. R. O. S. 335.

The statute extends to actions of ejectment, *qui tam* actions, actions by persons in representative characters, such as executors or

assignees of bankrupts; but it does not extend to actions of replevin, or to such other actions in which the defendants may take down the record to trial without a proviso, *Jones v. Concannon*, 3 T. R. 661, *Wyndowe v. Bishop of Carlisle*, 3 Bing. 404; nor does it extend to cases in which the plaintiff could not be nonsuited at the trial. 2ndly—The plaintiff must neglect to bring the cause to trial according to the course of the Court. In England the course of the Court is different in town and country causes, and slightly differs in the several Courts; but in this country an uniformity of practice has been established in all the Courts, and the rule is the same in town and country cases, and requires that the cause must be at issue three full terms before the defendant can apply for judgment as in case of nonsuit, *Moore & L. 17*. Thus, if issue is joined in Hilary Term, or the vacation after, the motion cannot be made until the ensuing Hilary Term, *Moore & L. 17*. If, within the time thus allowed by the Court, the plaintiff has not actually proceeded to trial, he is *prima facie* in default and is liable to the consequences of his neglect; but if this neglect has been in any way caused by the defendant, as where the plaintiff is stayed by injunction, or by rule from proceeding until he furnishes a bill of particulars, or until he paid the costs of taking defence to a former ejectment, or until the costs of a notice of trial withdrawn be paid, the defendant cannot obtain judgment as in case of nonsuit, *Wright v. Graves*, Batt. 131; *Lessee Uniacke v. Uniacke*, Id. 338; *M^r Cannon v. Neeson*, 2 H. & B. 153; *Read v. Shew*, 1 I. L. Rep. 269. In computing the three terms allowed by the Courts for the plaintiff to proceed to trial, it is settled that the period during which he has been, as it is called, tied up by the defendant, is not to be reckoned; and it is questionable if the plaintiff's default is to be deemed to initiate until the rule tying him up has been vacated, *Read v. Shew*, 1 I. L. Rep. 269; *Lebass v. Swiney*, Glas. 36, and the better opinion is that the plaintiff, after any such rule has been vacated, has three full terms within which to try his case. Although the plaintiff has thus an option of three terms, at either of which he may try his case, and is not in default until the last be past, yet, if he serves notice of trial and withdraws it, or enters the record for trial at the earliest opportunity and then withdraws it, this also is a neglect to bring the case to trial according to the course of the Courts, and entitles the defendant to judgment as in case of nonsuit, or to costs for not proceeding to trial, but not to both, *Burton v. Harrison*, 1 East. 346, *Howell v. Powlett*, 1 D.P.C. 263, 8 Bing. 272, S. C., *Minit v. Tremamondo*, 4 T. R. 53; but if notice of trial be countermanded at the request of the defendant, *Anon* 2 I. L. R. 167, or by consent, the plaintiff has performed his duty, and the defendant cannot take advantage of this neglect to obtain judgment of nonsuit under this statute. But although the general course of the Courts requires the plaintiff to try his cause within the three full terms, yet, particular circumstances create exceptions to this rule and disentitle the defendant to the benefit of this statute; thus, if the defendant has become insolvent or bankrupt after action brought, or after issue joined, the plaintiff will not be compelled to try his cause at all, but he will be allowed, on motion of the defendant, to enter a *stet processus*, *Feely v. Fitzpatrick*, 1 Jones, 106, *Hamill v.*

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Hannan, 5 L. R. N. S. 223, *Taylor v. Montague*, 2 M. & W. 315; and if the defendant does not consent to this, his motion for judgment in case of nonsuit, will be discharged with costs, *Smith v. Badcock*, 5 D. P. C. 91; but it ought clearly to appear that the insolvency of the defendant took place subsequent to the commencement of the action, and at least that the plaintiff was not aware of it when his action was brought, *Lemon v. Hobson*, 6 D. P. C. 795, *Going v. Dempsey*, 3 I. L. R. 2, where the action is brought to try a right which has afterwards been formally admitted by the defendant, the plaintiff need not proceed to trial, his object being gained, *Wynne v. Kelly*, 1 L. R. 2nd S. 8; or, when the plaintiff proceeds both against the acceptor and indorser, or drawer of a bill of exchange, which has afterwards been paid by the acceptor or other party liable, the plaintiff will not be compelled to try his cause, against either party, *Anon.*, 6 L. R. S. S. 350, *Monk v. Bonham*, 2 D. P. C. 386, Arch. Q. B. 1076, and *ante*, 135. These and others are considered as exceptions to the rule requiring the plaintiff to try within the three terms, and the defendant's rule for judgment as in case of nonsuit, will be unconditionally discharged, and, in general, with costs; Arch. Q. B. 1076. 3rdly.—If none of these circumstances occur to vary the general course of the Court, the defendant, after the lapse of three terms, will *prima facie* be entitled to his judgment as in case of nonsuit: "the motion for which must be made in open Court, due notice having been given to the plaintiff." It is the practice of all the Courts to grant, in the first instance, a conditional order only. No notice of applying for this is necessary, *Chambers v. Dugel*, Batt. 46, *Anon.* 1 I. L. R. 345, Moore & L. 28. In the Exchequer, this motion is grounded on a certificate of the pleadings; in the other Courts on an affidavit and pleadings, showing that issue has been joined, and the default of the plaintiff. The conditional order being served on the plaintiff is considered a compliance with the words of the statute, which require notice of the motion to be given. Upon the motion to make this conditional order absolute coming on to be heard, the Court has power to do one or other of two alternatives. The neglect having taken place, the statute requires the Court to give the defendant judgment as in case of nonsuit, *unless* upon just cause and reasonable terms a further time be allowed to the plaintiff to try his case. The power of the Court to allow this further time is, therefore, plainly conditional, and dependent upon just cause being shown for extending the time for trial. This cause must be shown by affidavit accounting for the neglect, and stating the circumstances of excuse which prevented the plaintiff from trying the case, within the three terms allowed by the course of the Court. Thus the absence of a material witness, or of documentary evidence—*Mountford v. Bond*, 2 D. P. C. 403, Arch. Q. B. 1077, *Raynes v. Spicer*, 7 T. R. 178—or the inability of the attorney of the plaintiff to attend the trial in consequence of a domestic affliction—*Weak v. Calloway*, 7 P. 531—has been held a sufficient reason for not trying the case in due time; so where the record has been withdrawn in order to obtain a special jury, or where the briefs could not be prepared in time, on account of the plaintiff's absence; *Webber v. Roe*, 3 D. P. C. 589, *Stone v. Tracey*, 1 East 544. But it is not a sufficient excuse that the attorney withdrew the record, because the plaintiff was poor, and had promised to supply

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with money, which he failed to do, in consequence of permanent liveness; *Cleasby v. Poole*, 3 D. P. C. 162. Yet, where the plaintiff only temporarily out of funds, the excuse was held sufficient to discharge the conditional rule on the usual peremptory undertaking; *Myford v. Smith*, 4 M. & W. 109. A practice had grown up in this country of discharging the conditional rule on a peremptory undertaking by the plaintiff to try his cause at the next assizes or sittings, without giving the reason of his previous default. This certainly was a practice grounded on the generally granted consent of the defendants, but is not warranted by the statute, for unless *just cause* be shown by the plaintiff, the defendant *must* have judgment, and he cannot be compelled to accept a peremptory undertaking; *Nicholls v. Collingwood*, 1 P. C. 60, and A. Q. B. 1,077. The validity of this practice was fully considered in the case of *Gillman v. Connor*, 1 Jebb and S. 763, when the Court of Queen's Bench, rather reluctantly, held that the "discretion of the Court is taken away, unless cause be shown why the plaintiff should not proceed to trial, and that according to the authorities," *Myford v. Burke*, 2 Chitty R. 244; *Nicholl v. Collingwood*, 2 D. P. C. 162; *Cleasby v. Poole*, 3 D. 162; *Ward v. Turner*, 5 D. 22; *Bunyan v. Bury*, 1 D. & R. 448,] "the former practice, whatsoever it might have been, could not affect the question." This judgment was fully sustained by the English authorities, and the words of the act, which clearly appear too plain to admit of argument. To hold the former practice correct, would be, in the words of a learned judge speaking on the subject, "to upset the act of parliament." That Court has, since the case of *Gillman v. Connor*, uniformly adhered to the construction of the statute there laid down, *Anon* 2 I. L. R. 167, *Anon* Id. 263, — *Worthington*, Id. 266. What shall amount to just cause for previous neglect is, indeed, within the discretion of the Court, and a slight cause will, in general, be deemed sufficient, 2 D. C. P. 60. The Court of Exchequer holds a peremptory undertaking to be "just cause" against an application for judgment as in case of nonsuit, *Tuthill v. Bridgeman*, 2 I. L. R. 167. To this case the learned reporters have annexed a note referring to *Mallett v. Hilton*, 2 H. Bl. 119, in which the Court of Common Pleas held that the application for the first time for judgment, as in case of nonsuit, was only a mode of obtaining the peremptory undertaking, and that no cause need be shown for the previous neglect. It is submitted that this practice is clearly as much at variance with the statute as it is with the present practice of the Courts in England and with that of the Queen's Bench in this country: it is only defensible on the ground that the plaintiff has been guilty of no neglect until default made after a peremptory undertaking. In the Court of Common Pleas the question has not been agitated, and the peremptory undertaking is generally accepted by the defendant. 4thly—If just cause be shown the rule will be discharged on the peremptory undertaking of the defendant to appear at the next assizes or sittings, or if from circumstances he cannot do so, at some subsequent period, and when the justice of the case requires it, the Court may add other reasonable terms, *Nicholson v. Turner*, 1 H. & W. 211. When in the Common Pleas the plaintiff gives a peremptory undertaking on the motion for the conditional order, the

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costs of the motion are costs in the cause; but after the conditional rule has been obtained, the plaintiff will not be permitted to give the peremptory undertaking, so as to prevent the order from being made absolute, unless upon payment of the costs of the conditional order. In the Queen's Bench the defendant is entitled to the costs of the conditional rule, and also to the costs of appearing on the motion to make it absolute. That Court will not, as of course, make it part of the rule discharging the rule nisi, that the defendant shall enter up judgment as in case of nonsuit. The defendant may move for judgment, as in case of nonsuit, without giving the three days' notice of proceeding, required in cases where no step has been taken in the cause within a year; *Lessee M'Ubre v. Wightman*, 5 L. R. N. 2. 322, Moore and L. 25. The plaintiff must proceed to trial according to his undertaking; but, although it is peremptory in words, if he has sufficient excuse for not performing it, the Court will not give the default judgment as in case of nonsuit, but will, on a proper affidavit, enlarge his undertaking; Arch. Q.B. 1079, 1080; *De Rutzen v. Lloyd*, 5 D.P.C. 383. This is perfectly in conformity with the words of the act, which allow the Court to give the defendant further time or times for hearing his case. The rule will be enlarged only on payment of costs. The length of this note will be excused by the differences of practice of the several Courts, which made it desirable to state their peculiarities.

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A declaration in *indeb. assumpsit*, was entitled generally "as of Easter term, 1840, and stated that "the defendant heretofore, to wit, on 31st October, 1840, was indebted, &c." The jury found for the plaintiff.

Held, that

the Court will presume the judge at *nisi prius* to have directed the jury properly, and to have excluded from their consideration any cause of action not accrued before the declaration filed, and a motion in arrest of judgment was refused.

A motion to reduce a verdict pursuant to leave reserved at the trial, is of the nature of new trial motion, and the notice of such motion must be served within the first six days of term.

ASSUMPSIT for use and occupation of a house. The declaration contained the ordinary count for use and occupation, and the money counts, and was entitled generally, "As of Easter term, in the year 1840."—The first count stated, "For that the defendant heretofore, to wit on the *thirty-first* day of October, 1840, was indebted to the plaintiff, &c." The subsequent counts stated, "And whereas the defendant, on the day and year afore-

"said, was indebted to the plaintiff, &c." The defendant had pleaded a set off, *actio non*, "because he saith, that before and at the time of the commencement of this suit, to wit, &c., the plaintiff was indebted to the defendant in a large sum of money, &c.," in the usual form.

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At the trial of this case, at the sittings after last term, before the Lord Chief Baron, the objection had been made that the alleged cause of action was stated to have accrued after the filing of the declaration; his Lordship had offered to allow the plaintiff to amend his declaration, but the plaintiff's counsel did not think it necessary to avail themselves of the permission. A verdict had been given for the plaintiff; the learned judge having reserved liberty for the defendant to move to have the amount of the damages reduced by the amount of half a year's rent of the premises; and now

Dwyer, for the defendant, moved in arrest of judgment, on the ground that the alleged cause of action was stated to have accrued on a day subsequent to the term of which the declaration was entitled; or if the Court should not be of opinion that the judgment should be arrested, that the verdict might be reduced, pursuant to the leave reserved by the learned Chief Baron.

Macdonough, for the plaintiff, objected—First, that the defendant's notice of motion was grounded on an affidavit "to be filed;" which was clearly irregular, and entitled the plaintiff to have the notice dismissed with costs.—Secondly, that the defendant had after the six first days of term, served a fresh notice of the motion to reduce the

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verdict, which being in the nature of a new trial motion, the notice was irregular.

Dwyer consented to give up the affidavit in question.

BRADY, C.B.—We will allow the case to proceed. The notice is a conditional notice, and we will not discuss it until we have disposed of the original motion in arrest of judgment.

Dwyer.—The authorities on this subject are collected in 1 Chitty, Pl. 289, where it is laid down, that “where it is positively and expressly averred in the declaration, that the party has sustained damage from a cause subsequent to the commencement of the action, or previous to the plaintiff’s having any right of action, and the jury give entire damages, judgment will be arrested.” In *Ruston v. Owston*(a), the Court considered that the day on which the promise was laid, being a day in the term of which the declaration was delivered, the Court would infer that the declaration was delivered before the cause of action had accrued. In *Venables v. Daffe*(b) where there was a general memorandum of the term, and the declaration related to a day within the term, the Court held it a fault not cured by verdict. *Pugh v. Robinson*(c), was a different case from the present; so *Tatlow v. Batement*(d); *Bertie v. Pickering*(e); *Pope v. Tillman*(f); *Pippet v. Hearn*(g). I admit that a motion in arrest of judgment cannot be

(a) 1 M.C. & Y. 202.

(c) 1 T. R. 116.

(e) 4 Bur. 2445.

(g) 5 B. & A. 634.

(b) Carth. 113.

(d) 2 Lev. 13.

(f) 7 Taunt. 642.

sustained where the matter is aided by verdict. Tidd. Pr. 919, 9th edition. In *Wiatt v. Essington*(a), a principle is laid down not inapplicable to the present case; that where a recovery by verdict cannot be pleaded in bar to another action for the same cause, the judgment will be arrested; so in this case, as the judgment if made up would be of *Easter* term, it would be no bar to an action for the subsequent rent. Where an averment is material, (as that of the time when the cause of action accrued) the addition of a "*videlicet*" does not render it immaterial, *Grimwood v. Barrit*(b). The bill of particulars claims a demand, subsequent to August, 1840, and it is part of the record.

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Haig, contra.—The Court has overruled such an objection as this, in the only two modern cases which have been cited on the other side, *Ruston v. Owston*(c), and *Pugh v. Robinson*(d); and in these the Court expressed disapprobation of such a point being made in such a case.

The case of *Venables v. Daffe*(e), was one of an action for a malicious prosecution, and the statement was, that the prosecution was brought on a day after the declaration was filed. There is here an express averment that the cause of action was "heretofore," and the precise time is laid under a *videlicet*. The defendant by his plea states his matter of defence to this action to have arisen before the action was brought, so that if there be any defect, the defendant has cured it himself. It must be intended by the Court that the jury have found upon the whole record. In

(a) 2 Ld. Ray. 1410.

(c) 1 M'Cl. & Y. 202.

(e) 1 Carth. 113.

(b) 6 T. R. 460.

(d) 1 T. R. 116.

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rity for holding that the Court will look to what the judge ought to have done at the trial below. Now in the case of *Ruston v. Owston*(a), the Court resorted to a very subtle train of argument to get rid of the objection; that was a case of judgment by default, and, therefore, there was nothing cured by verdict; but they resort to the very matter objected to, to show the declaration was filed in time, that is, because the cause of action was stated to have accrued on the 18th of November, they inferred the declaration, which was entitled of *Michaelmas* term generally, to have been filed before that time, as the whole term was considered in law but as one day. We do not go so far on this case, and all we are called upon to infer is, that the judge did that which it was his duty to do, and excluded from the jury all matters which they ought not to have taken into consideration. Now it appears that where a declaration is filed generally, it is open to the party to give particular evidence of the time of filing. That is illustrated by *Lester v. Jenkins*(b), in which a declaration on a bill of exchange was entitled generally as of *Hilary* term, 1828, and the bill became due on the first of February. In that case they called on the judge for a nonsuit, on the ground the action was brought before the bill was due; but the plaintiff's attorney proved that instructions were not given to him to commence the action until the bill had been dishonoured, and that he took no proceeding until after the 1st February. *Bayley, J.* there says, "The memorandum is *prima facie* evidence of the time of the commencement of an action, and uncontradicted, is conclusive. But it is clearly established by authorities, that either party may show, by evidence, the actual time of the commencement of the

(a) 1 M'Cl. & Y. 202.

(b) 8 B. & C. 339.

attention of the jury to the record, and that the judge will take care that no matter is improperly brought before them; the Court will presume that the jury did not find their verdict on any thing not open to them on the record; and as a matter of fact, I took care, at *nisi prius*, to exclude every thing from their attention before the time when the declaration was filed. Several cases have been cited in argument, in which judgment has been arrested, but these are of a peculiar nature. The case of *Venables v. Daffe*(a), was an action for a malicious prosecution, in which the acquittal, by the plaintiff's own showing, was after the commencement of *Michaelmas* term, of which the declaration was entitled; the Court considered that to be matter of discretion and material. So in the case of *Dickinson v. Plaisted*(b), where the Court gave leave to amend to avoid the objection; the action was on a promissory note, and the Court were then obliged to hold that it could not be given in evidence upon the record. So in another case where the action was brought on the indentures of an apprentice, for loss of his services during the term, part of which was unexpired, the Court considered this to be helped upon demurrer, though it might be bad after verdict, and allowed the plaintiff to take damages for the departure, not for the loss of service during the term, *Horn v. Chandler*(c). *Yalden v. Hubbard*(d) is very like the present case, it was there moved in arrest of judgment, that entire damages were given; but the Court refused to arrest the judgment, on the ground that the jury could not have legally taken into consideration that part of the cause of action which had not accrued at the time when the declaration was filed. That is an express autho-

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(a) Carth. 113.

(c) 1 Mod. 271.

(b) 7 T. R. 474.

(d) Comyn. Rep. 331.

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rity for holding that the Court will look to what the judge ought to have done at the trial below. Now in the case of *Ruston v. Owston*(a), the Court resorted to a very subtle train of argument to get rid of the objection; that was a case of judgment by default, and, therefore, there was nothing cured by verdict; but they resort to the very matter objected to, to show the declaration was filed in time, that is, because the cause of action was stated to have accrued on the 18th of November, they inferred the declaration, which was entitled of *Michaelmas* term generally, to have been filed before that time, as the whole term was considered in law but as one day. We do not go so far on this case, and all we are called upon to infer is, that the judge did that which it was his duty to do, and excluded from the jury all matters which they ought not to have taken into consideration. Now it appears that where a declaration is filed generally, it is open to the party to give particular evidence of the time of filing. That is illustrated by *Lester v. Jenkins*(b), in which a declaration on a bill of exchange was entitled generally as of *Hilary* term, 1828, and the bill became due on the first of February. In that case they called on the judge for a nonsuit, on the ground the action was brought before the bill was due; but the plaintiff's attorney proved that instructions were not given to him to commence the action until the bill had been dishonoured, and that he took no proceeding until after the 1st February. *Bayley, J.* there says, "The memorandum is *prima facie* evidence of the time of the commencement of an action, and uncontradicted, is conclusive. But it is clearly established by authorities, that either party may show, by evidence, the actual time of the commencement of the

(a) 1 M'Cl. & Y. 202.

(b) 8 B. & C. 339.

“suit to be different from that which it purports to be by
 “the record.” That case shows the practice to be, that
 unless a party proves a cause of action accruing before the
 time stated on the record, he must be nonsuited; it proves
 that conclusively. There were several other cases discussed
 in the course of the argument, but we do not think them
 applicable, and the motion must be refused.

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Dwyer then moved in the alternative to reduce the
 verdict, according to the liberty reserved on the judges
 notes.

Haig objected that the notice, of this motion, should
 have been within the six first days of term(b). It was not
 served until the seventh day.

Dwyer.—This is not a new trial motion.

BRADY, C.B.—A case of the kind has always been
 treated as a new trial motion, and we have done so this term
 in a case of *Jennings v. Corr*. It is plainly a new trial
 motion, as it is grounded on the certificate of counsel, and
 the judge's notes.

Refused without costs.

(a) 3 B. & A. 605.

(b) *Vide* Yeo. & Billings, Pr. 66.

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EXCHEQUER
OF PLEAS.

Tues. Jan. 25.

SONDER v. DARCY.

Where a declaration in *assumpsit* by indorsee against maker of a promissory note, contained a count alleging a promise to pay "according to the tenor and effect" of the note, and the consolidated money counts; and the general conclusion alleged a promise "to pay the said several monies to the plaintiff respectively on request."

Held, on demurrer, that the promise was well enough laid; though the words "last-mentioned" were omitted in the general conclusion.

ASSUMPSIT by the indorsee against the maker of two promissory notes; the declaration contained a count on each note and the money counts. The first count was as follows:—

" For that whereas the defendant, on the 1st day of May, in the year 1836, at *Bordeaux*, in *France*, to wit, at the city of *Dublin*, in the county of the said city, made his promissory note in writing, and then and there delivered the same to *Catherine De Burgh*, widow, and thereby promised to pay to the said *Catherine De Burgh*, or order, ten months after date thereof, (which period has now elapsed,) the sum of 4,000 francs, value received by him in ready money. And the said *Catherine* then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there, in consideration of the premises, promised the plaintiff to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof. And the plaintiff avers that the sum of 4,000 francs in said promissory note mentioned, at the time of making said note, and when the same became due, was and still is of great value, to wit, of the value of £500 of lawful money of Great Britain and Ireland."

There was a similar count on another note for 600 francs,

and an averment that the same was of the like value of £500 *British and Irish* money.

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The declaration then contained the usual money counts, commencing—"And whereas the defendant, on the 1st "January, in the year of our Lord, 1839," concluded as follows:—"And therefore the defendant, afterwards, "on the day and year aforesaid, in consideration of the "premises respectively, then and there promised the "plaintiff to pay the said several monies to the plaintiff "respectively on request: yet he hath disregarded, &c."

The defendant demurred specially to the two first counts on the grounds that there were double promises to the two first counts, and that these promises were inconsistent; one being a promise to pay "according to the tenor and effect" of the note, the other a promise to pay "on request;" and that these two promises were inconsistent. Joinder in demurrer. The defendant pleaded *non assumpsit* to the money counts.

Skelton and *Rolleston* in support of the demurrer. These are a double set of promises: without the words "*last mentioned*" in the general conclusion, the promise averred in it extends to the preceding counts. *Mills v. Banfield*(a), *Harding v. Hibel*(b), *Wilson v. Mitchell*(c), *Chitty on Bills*, 152. *Christie v. Peart*(d). The general rules(e) show the necessity of introducing the words "*last mentioned*," [BRADY, C. B.—The rule only says "it shall

(a) 1 Jebb & S. 655.

(b) 4 Tyr. 313.

(c) *Ante*, p. 275.

(d) 9 D. Pr. C. 291.

(e) *Yeo. N. R.* p. 96.

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be proper to do so." If there were no promise in the first count, we would call in aid the general promise in the conclusion; but why should we transpose the promise from another count?] The first and second counts are indeed complete in themselves; but yet the promise in the conclusion extends to them: it is not surplusage: the true test of surplusage is, could it be struck out on motion? This could not be so struck out, for it would leave the ~~many~~ counts without a promise relating to them at all.

Monaghan, Q. C. and Keogh in support of the declaration. The promises are not inconsistent, for the first promise was to pay the note "according to its tenor and effect;" the second was a promise on the 1st January, 1839, "to pay the said monies on request." The bill was due for a year before the subsequent promise was made; and an allegation of such a promise is not duplicity, *Christie v. Peart*(a). In *Denison v. Richardson*(b), Lord *Ellenborough* observes, that if there were an allegation of when and where, the Court could have supplied the allegation of time and place. [BRADY, C. B.—The case of *Christie v. Peart* goes farther than we are called upon to do, for that was a promise to pay on a day long past.] The statement is that the defendant undertook to pay a number of francs, and in consideration of that, he promised to pay upon request. Whether the declaration be considered as two counts or as one, it is not demurrable on these grounds, *Galway v. Rose*(c).

BRADY, C. B.—I think this demurrer must be over-

(a) 9 Dowl. Pr. C. 291.
 (c) 6 Mee. & W. 291.

(b) 14 East. 301.

ruled, and that in overruling it, we are not called upon to disturb any thing that has been decided in any previous case. The declaration contains two counts, one on a promissory note, which in itself is a perfect count; there being a promise laid to pay according to the tenor and effect of the note; the other being a like count on another note, and then it contains the consolidated money counts, commencing with "whereas, &c.," and at the conclusion of the declaration are the words, "and therefore, &c."—that is, *because* he was so indebted, "the defendant promised to pay the said several monies on request." Now, unquestionably, these words may be called in aid of the previous count if it omitted to allege a promise, provided this general promise, so made, was fit to support it. But here we are called upon to refer the promise in the last count to the first, for the purpose of creating an inconsistency, by importing a promise which the first count would not support. This is, in my opinion, a purely frivolous demurrer; and if we were called upon to set it aside as such, I should be strongly inclined to do so. The directions in the forms annexed to the several rules are merely used as a suggestion, for the sake of grammatical propriety, of using those words. On these grounds, I am of opinion, that this demurrer must be overruled.

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Demurrer overruled.

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EXCHEQUER
OF PLEAS.
Tues. Jan. 25.O'LOUGHLIN *v.* FOGARTY, and Another.

1st. In debt on a bail piece against bail, the declaration stated a judgment recovered by the plaintiff against the principal on the 17th June, 1840, of £81 16s. 1d., "for his damages, which, &c., as well on occasion of not performing certain promises," &c. by the principal, "as for his expenses and costs." Plea: *nul tiel record*. The entry of judgment was of the 27th May, 1840, and there was a marginal memorandum in the roll opposite the entry, "17th June, 1840." The entry was of three several sums for costs, damages, and costs of increase.

Held, to be no variance, the allegation of the judgment not being matter of description.

Held, also, that "damages" include "costs."

2nd. The defendant pleaded no *ca. sa.* issued against the principal, and the plaintiff relied, a *ca. sa.* issued, and a return "that he was *not found*." The return itself was "*not to be found*." *Held*, no variance; being of the same import.

The defendant may take advantage of all such objections on the plea of *nul tiel record*.

3rd. It is not ground of general demurrer, that the replication omitted to state that the county into which the *ca. sa.* had issued, was the county in which the venue in the original action had been laid.

DEBT upon a bail piece. The declaration stated that whereas the defendant heretofore, to wit, on the 24th October, 1839, at *Limerick*, to wit, at *Castle-street*, in the county of the city of *Dublin*, came in their proper persons before one *Holmes O'Brien*, at his office in the city of *Limerick*, the said *Holmes* being then a Commissioner, duly appointed and empowered by this honourable Court to take special bail in and for the said city of *Limerick* in any action depending in the Court here, according to the statute in such case made and provided, and then and there, to wit, on the day and year last aforesaid, at *Limerick*, to wit, &c., before the said *Holmes O'Brien*, so being such Commissioner, became pledges and bail for one *Christian Zinck* to pay all such damages, expenses, and costs, as should be awarded the said plaintiff in a certain action upon promises then depending in this Court, by and at the suit of the plaintiff against the said *Christian Zinck*, or render the body of the said *Christian Zinck* to the Marshall of the Marshalsea of the Four Courts, *Dublin*; which bail piece afterwards, to wit, on the 7th day of November, 1839, to

wit, at, &c., was then and there duly transmitted and brought into the said Court here to be filed and recorded; and thereupon the said bail piece was duly filed and recorded in the said Court here, to wit, on the day and year last aforesaid, to wit, &c., as by the record thereof still remaining in the said Court here fully appears; and although the plaintiff *afterwards, to wit, on the 17th day of June, in the year 1840*, by the judgment of the said Court, recovered in the said action against the said *Christian Zinck £81 16s. 1d. for his damages, which he had sustained as well on occasion of not performing certain promises and undertakings then lately made, by the said Christian Zinck to the plaintiff, as for his expenses and costs by him about his suit in that behalf expended, whereof the said Christian Zinck was convicted, as by the record and proceedings thereof still remaining in the said Court here more fully appears; yet the said defendants have not, nor has either of them, nor has the said Christian Zinck paid to the plaintiff his said damages, or any part thereof, nor rendered the said Christian Zinck on that occasion or at all to the prison of the Marshall of the Marshalsea of the Four Courts at Dublin, according to the said bail piece. And the plaintiff avers that the said bail piece, as also the said judgment, still remain in force, and the plaintiff hath not as yet obtained any execution or satisfaction of the said judgment, whereby an action hath accrued, &c.*

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To this declaration the defendant pleaded, first, payment by the defendants; secondly, payment by the principal; thirdly, *actio non*; because that after the recovering of the said supposed judgment as in the said declaration mentioned, and before the exhibiting of the said bill of the

1842. plaintiff against the defendants in this behalf, there was
 O'LOUGHLIN no writ of *capias ad satisfaciendum* duly sued or prosecuted
 v. out of the said Court of our Lady the Queen before the
 FOGARTY. Barons of her Exchequer against the said *Christian Zinck*
 upon the said judgment and duly returned in the said
 Court, as according to law, and the custom and practice
 of the said Court there ought to have been, and this the
 defendants are ready to verify, &c. The fourth plea was
 accord and satisfaction, by delivery of certain goods of
 the said *Christian Zinck* by the defendants to the plaintiff,
 concluding with a verification; the fifth plea was like the
 fourth, only alleging the delivery of the goods by *Christian*
Zinck. The fifth plea was in substance like the two fore-
 going, alleging the delivery of the goods by the defendants,
 by and with the assent of *Christian Zinck*, and the last
 plea was *nul tiel record* to the judgment.

The defendant by his replication to the first and second
 pleas traversed the alleged payment, tendering issue; and
 to the third plea replied that a *capias ad satisfaciendum*
 was duly sued out against the said *Christian Zinck*(a) and
 returned, the return being thus pleaded:—And the said
 sheriffs, to wit, *R. W. B.* and *T. L.* Esquires, on that day
 returned to the said Barons of our said Lady the Queen's
 Exchequer, at the Queen's Courts, *Dublin*, aforesaid, in
 the said writ, that the said *Christian Zinck* was not found
 in their bailiwick, as by the said writ of *capias ad satis-*
faciendum, and the return thereof duly filed in the said
 Court of Exchequer, here now fully appears. And this
 the said plaintiff is ready to verify, &c. The plaintiff

(a) See the Precedent, 3 Chitty Pl. 1182, 5th ed.

traversed the 4th, 5th, and 6th pleas, concluding to the country, and replied *tiel record* to the plea of *nul tiel record*.

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The record being produced in Court contained the entry of judgment thus :—“ And because the Barons here are willing “ to advise, &c., a day is given to the said parties here, and “ soforth, until *Wednesday*, the 27th day of *May* next “ following, to hear their judgment thereon, for that the “ said Barons here are not as yet thereof,” and soforth. “ Therefore it is considered by the Barons here that the “ said plaintiff do recover against the said defendant, his “ damages aforesaid, to the sum of £37 8s. 10d. sterling, “ assessed by the said jury in form aforesaid, and the said “ six pence sterling in like manner assessed by the said “ jury in form aforesaid, and also the sum of £44 6s. 9d. “ adjudged by the Barons here to the said plaintiff, with “ his assent, by way of increase for his expenses and costs “ aforesaid, which said damages, expenses, and costs, “ amount in the whole to the sum of £81 16s. 1d. sterling, “ and the said defendant as in mercy, &c.” In the margin of the roll opposite the entry of the judgment was— “ Rule for judgment, 17th June, 1840.”

The sheriffs' return to the writ of execution was—“ The within named *Christian Zinck* is not to be found in our bailiwick, nor was he at the time of the coming of the within writ to us, or at any time since, to be found therein. So answers,

R. W. B. }
T. L. } Sheriffs.

Filed, 26th November, 1840.”

1842. The Court having fixed this day for inspecting the
 O'LOUGHLIN record, the case now came on to be argued upon the plea
 v. of *nul tiel record*.
 FOGARTY.

Thomas Fitzgerald and Napier for the defendant.—
 There are three points of material variance between the
 record as pleaded in the declaration and the record itself.
 First, the declaration states that the judgment against the
 principal was recovered on the 17th June, 1840; but
 the entry in the roll is of a judgment pronounced on 21st
 May, 1840, and the 17th June is only a memorandum in
 the margin: the judgment is pronounced when awarded,
 that is, upon the last continuance entered on the roll, and
 the record cannot support two contradictory allegations.
 The last continuance is on 27th May. The Court has
 judicial knowledge that the 17th June is not a day in
 term; and the Court cannot pronounce judgment on a day
 in vacation, though for the security of purchasers of land,
 a judgment is made to take effect from the docketing by
 the provisions of the docketing act(a). The judgment
 against the principal does not give *instantly* the right to
 proceed against the bail, and so this case is distinguishable
 from those in which the *time* of recovery of a judgment
 was not material, but only the *fact* of its recovery. Again,
 those cases were not brought before the Court on a plea
 of *nul tiel record*. The utmost precision is necessary here.
 In *Purcell v. M'Namara*(b) the action was for a malicious
 prosecution, and it is distinguishable from the present case.
 In *Phillips v. Shaw*(c) the time of recovery of the judgment
 was immaterial; but in this case the judgment against

(a) 3 Geo. II. c. 7.

(b) 9 East. 157.

(c) 4 B. & A. 435.

the principal is the very foundation of the action. [BRADY, C. B.—Is not the recognizance of bail the foundation of this action?] The time of the recovery of the judgment is material. [BRADY, C. B.—Though we may refer the entry of the judgment back by a legal fiction, are we bound to do so? The plaintiff says, on that day I got my judgment, and that is the truth. I do not see why we are to shut our eyes to the marginal note.] A trifling inaccuracy is fatal in such cases, *Green v. Rennett(a)*, *Hozier v. Powell(b)*, *Chetley v. Wood(c)*, even though the sense of the words be not altered, *Bevan v. Jones(d)*, *Phillipson v. Mangles(e)*, and the question is not, is the variance material or not, but is it a variance? A party taking upon him to set out the tenor of a record must do it with precision. If the allegation of the recovery were not material it would not be traversable; but it must be traversable, or else the issue must be immaterial.

Secondly, The declaration states that the plaintiff in the original motion, “on the 17th June, 1840, by the judgment of the Court, recovered” against the defendant an entire sum of £81 16s. 1d., “as well for his damages, &c., as for his expenses and costs;” but the entry of the judgment upon the roll is, “it is considered, &c., that the said plaintiff do recover against the said defendant his damages aforesaid to the sum of £37 8s. 10d. sterling, assessed by the said jury in form aforesaid, and the said 6d. sterling, in like manner assessed by the said jury in form aforesaid, and also the sum of £44 6s. 9d., adjudged

(a) 1 I. R. 656.

(b) 6 L. R. 288.

(c) 2 Salk. 659.

(d) 4 B. & C. 403.

(e) 11 East. 516.

1842. " by the Barons here to the said plaintiff, with his assent,
 O'LOUGHLIN " by way of increase for his expenses and costs aforesaid."
 v.
 FOGARTY. The pleader should have set out the damages as a particular sum, and so much for expenses and costs. [BRADY, C. B.—I apprehend that in legal parlance the costs are part of the damages; *Phillipps v. Bacon*(a) is a direct authority for that.] There is a sufficient distinction between damages and costs; *Phillipps v. Eamer*(b). In many actions the costs depend upon the quantum of damages, as assault and battery, slander, and trespass; and in a case of that description it would be necessary to set out both costs and damages. What may be sufficiently pleaded in itself, will not be so if pleaded with a *prout patet*, as here; *Gadd v. Bennett*(c).

Thirdly, This being an action against bail, we are entitled to show that no *ca. sa.* had been issued and duly returned, and have so pleaded; the plaintiff has replied the issue and return, and averred the sheriffs' return in these words, " that the said *Christian Zinck* was not found in their bailiwick." The return should be that he was "*not to be found*." [BRADY, C. B.—The return upon the back of the writ is that he was "*not to be found*."] A party is not obliged to demur in such a case as this, but has a right to make the objection when the record is brought into Court; *Jackson v. Wickes*(d). (*Monahan, (amic. cur.): In White v. White*, decided in this Court(e) upon a plea of *nul tiel record* upon a judgment of revivor, the Court ruled that there was no variance, but permitted me to move in arrest of judgment on the ground that the pleading was bad

(a) 9 East. 298.

(b) 1 Esp. 355.

(c) 5 Price, 540.

(d) 7 Taunt. 30.

(e) Reported in a note to *Martin v. M' Causland*, 3 Ir. L. R. 118.

in substance). “Not found” is not a good return, for *non constat* that the sheriff looked for the party against whom the writ issued. The replication is bad upon general demurrer, for there is no averment that the city of *Limerick* was the venue of the original action; *Dudlow v. Watchhorn(a)*, *Sandon v. Proctor(b)*.

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Henn, Q.C., and *D. R. Kane*, *contra*.—As to the first point—*Phillipps v. Bacon(c)* rules this point. The case of *Phillipps v. Eamer(d)* does not appear to affect the question at all; it only shews that we might have stated the three sums distinctly: here there is, in point of fact, no variance at all.

As to the second point:—Where a record is not the foundation of the action, the Court will only look to the substantial averment; the recovery of the judgment is the substantial averment here, and the precise day is immaterial, *Green v. Rennet(e)*; it is, therefore, unnecessary to plead *it prout patet per recordum*, Co. Lit. 303, a. This distinction is very clearly taken in *Purcell v. M'Namara(f)*; the averment here is, that “*afterwards*, to wit, &c., the judgment was recovered;” and if that be the substantial averment, the nature of it cannot be altered by the mode of proof which the plaintiff has recourse to sustain it, *Phillips v. Shaw(g)*; *Stoddert v. Palmer(h)*. The Court will not notice a legal fiction for the purpose of working injustice, *Bennett v. Isaac(i)*; but if it were matter of

(a) 16 East. 40.

(c) East, 298.

(e) 1 T. R. 656.

(g) 4 B. & A. 435.

(i) 10 Price, 154.

(b) 7 B. & C. 800.

(d) 1 Esp. 355.

(f) 9 East. 157.

(h) 3 B. & C. 2.

1842. description the proof supports it. The Court will take
 O'LOUGHLIN v. judicial knowledge that the officer was bound to enter the
 FOGARTY. judgment in vacation, and that it has relation to the
 antecedent term.

As to the third point, the return of the writ is pleaded according to the precedents in Chitty. It is a merely formal proceeding, and we produce a writ duly returned and filed. [BRADY, C.B.—In Tidd's Practice, it is said that the sheriffs' return is "not found." Surely the word "found" implies a search]. This point comes upon us quite by surprise. [BRADY, C.B.—This is a very inconvenient way of bringing forward such objections; and we will make a rule that every party, bringing forward a plea of *nul tiel record*, shall deliver to the officer a list of his objections, and of the points upon which he means to insist(a).] The bail piece is part of the record, and in this issue we may look at the record for the original venue. The Court will presume that the officer did his duty in directing the *ca. sa.* to the sheriffs of the county in which the action was brought, and without a return of that writ, the Court would not issue a writ of *testatum ca. sa.*

BRADY, C. B.—From the way in which this case has come before the Court, it has occupied more time than it

(a) The following rule was made :—

"26th January, 1842.

"It is ordered that in future, when any issue of *nul tiel record* shall be set down in the list, the party taking such issue shall furnish to the officer for the information of the Court, a short abstract of the pleading in which the record is averred, together with the points on which such party intend to rely, and shall have attested copies of the pleadings ready to be produced to the Court on the case being called on."

ought to have taken. However, we must, of course, dispose of the points as they have been raised, upon such grounds as occur to us. And first, as to the plea of *nul tiel record*, by which the defendants plead there was no such judgment as has been alleged to have been recovered by the plaintiff. It is conceded that if the allegation be matter of description, it must be proved as stated; but if only matter of substance, it is sufficient if it be proved substantially. And here it is necessary to determine in an action against the bail what the judgment against the principal is: it is not strictly the foundation of the action; the foundation of the action is the recognizance of the bail. It is incumbent on the plaintiff to prove that he is entitled to recover something on the contract between the parties, and to show a breach—that breach is, that the plaintiff had obtained a judgment against the principal, and that the principal has not satisfied that judgment. The judgment is not the foundation, but only the conveyance of the action, collateral thereto, *Hargreaves v. Rogers*(a). The second resolution in that case is, that it is not shown that the writ was served nor that it was returned, nor that the plaintiff declared, nor how the judgment was. But it was thereto answered that inasmuch as it alleged that both appeared at the day of return, and that *taliter processum fuit* that the plaintiff had recovered, it was sufficient, being but a conveyance to the action, and collateral thereto. We have here a direct authority that a judgment in an action against the sureties on a recognizance of bail is but inducement and conveyance, not the foundation of the action: that being so, must we not deal with it as with

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(a) Cro. Jac. 45.

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judgments in other cases, not the foundation of the action? The substantial allegation is, that the plaintiff did, ~~after~~ that the recognizance was entered into, recover. Now, clearly, that is the allegation; and he would substantiate it by proof of a subsequent judgment. I cannot distinguish this case from others in which the judgment is cited as collateral to the action. *Stoddart v. Palmer*(a) seems to me therefore to rule the present case. It rules ~~this, that~~ an allegation *prout patet per recordum* will not put the party on more strict proof than if there be no such allegation. Chief Justice Abbott's judgment is clearly in favour of this view. He says, "Whatever may have been the rule upon this subject in ancient times, a distinction is now established between allegations of matter of substance and allegations of matter of description. The former require to be substantially proved—the latter require to be literally proved. That distinction was laid down by the Court in *Purcell v. Macnamara*, and has since been acted on in the case of *Phillips v. Shaw*. If, therefore, the allegation that the plaintiff by judgment recovered, &c., be an allegation of substance only, it was sufficient to prove any judgment to warrant the writ. If, on the other hand, it be an allegation of description, it was necessary to prove a judgment corresponding in time, and in all other circumstances, with that stated in the declaration. Now it is contended that this is a descriptive allegation, because the plaintiff has alleged a judgment *prout patet per recordum*. The declaration in *Purcell v. Macnamara* and the count on which the verdict was taken in *Phillips v. Shaw*, did not contain

(a) 3 B. & C. 2.

“ any such averment ; and Lord *Ellenborough* in the former
 “ case, intimated an opinion, that if there had been such 1842.
 “ an averment, it might have been considered as descrip- O’LOUGHLIN
 “ tive of the record, and that the variance would have been v.
 “ fatal. But, upon consideration, it appears to us that FOGARTY.
 “ that opinion is not correct, and that the introduction
 “ of the averment in this case is wholly immaterial.”
 Upon these reasons, therefore, the judgment stated here is
 not the foundation, but is collateral to the action and
 matter of substance. When we consider the objections
 made as matters of variance, I should feel disposed to rule
 them with the plaintiff. There are two grounds of variance
 alleged, one is, that the judgment was recovered on the
 17th June, 1840. We may take it that this was a judg-
 ment, entered up in vacation under the statute, authorizing
 immediate execution ; but when we consider the roll pro-
 duced, it would be strong to hold it is not a record of that
 day, when the officer, in pursuance of statute 7 Will. III.
 c. 12, s. 11, made an entry of the day on which the
 judgment was entered. If the question had been between
 judgment-creditors and purchasers, should not the judgment
 have been pleaded as a judgment of that day ? The
 observations of Baron *Graham*, in the case of *Bennett v.*
Isaac(a), are apposite. “ The Court, to prevent its
 “ operating injuriously, may, and frequently do, inquire of
 “ the fact of the actual day on which judgment was
 “ entered up, as for the purpose of ascertaining whether
 “ the case is within the statute of limitations, and on other
 “ occasions of the same nature.” So much for that point
 of variance, if it were necessary to decide it.

(a) 10 Price, 154.

1842. The next objection that has been taken is, that the whole sum recovered is called *damages*. But *Phillips v. O'LOUGHLIN* v. *Fogarty*. *Bacon*(a), expressly decides that *costs* are *damages*, and that an allegation that a certain sum was awarded for damages, is supported by proof that the sum was awarded for damages and costs, upon the very ground that costs are parcel of the damages. But here "*damages*" is not the only word; but there are also the word "*expenses and costs*."

We now come to the point, that no *ca. sa.* was duly issued and returned. The sheriff returns that the defendants are "*not to be found*;" the return stated in the pleadings is, that they are "*not found*." No authority has been cited to show that this is a bad return, and *Tidd*, a work of great authority and accuracy, has the returns invariably in the latter form. We refer to the Latin returns, that is, *non est inventus*, that is either not to be found or not found—the two expressions are identical. An action for a false return would lie on either; there is no difference. A ground of general objection to the replication has been urged, and, as first proposed, it seemed worthy of consideration; it is this, that there is no allegation that the county of the city *Limerick* was the venue of the original action. I will not say what my opinion may be, if it ever comes before the Court, on special demurrer; but the question is, if it be bad upon general demurrer. We know that the writ must first issue to the venue in the original action, and we are not to infer that the officer did not do his duty. The case of *Dudlow v. Watchorn*(b), shows that such an

(a) 9 East. 298.

(b) 16 East. 40.

objection may be urged, but it is open to the defendant to contend that the omission of the allegation is material. I cannot think that it is; that is the only case cited; it was decided when, by the practice of the Court, it might have been rejoined that the *ca. sa.* did not lie four days in the office. If that were law, as now contended for, it would be equally necessary to aver that the writ lay four days in the office; and there being no precedent of such averment, we cannot hold it necessary. This ground of general demurrer cannot be sustained.

1842.
O'LOUGHLIN
v.
FOGARTY.

RICHARDS, B., concurred.

Judgment for the Plaintiff.

EARL OF SHANNON *v.* DOWDEN.

1842.
EXCHEQUER
OF PLEAS.
Thur. Jan. 27.

DEBT for tithe rent-charge.—The declaration contained three counts (a); the first of which stated a composition for tithe in the parish of *Ballinaboy*, in the County of Cork, made on the 13th December, 1833, whereby the annual amount of the said composition was fixed by a certain certificate, and an applotment and assessment pursuant thereto, which applotted and assessed upon certain titheable land within the said parish, the sum of £24 7s. 6d., payable to the plaintiff as lay impropriator, and that the defendant, on 1st November, 1838, and for two months ending on that

In debt for tithe rent-charge it is not sufficient to plead non-payment of tithe for thirty years before the composition under 4 Geo. IV. c. 99, without alleging that the lands were exempt from payment of tithe; such plea is bad on general demurrer.

(a) See O'Leary on Rent-Charges—Appendix, 15.

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day, and at the passing of the Act 1 & 2 Vic. c. 109, had, and from thence continually had had, in the said titheable lands, the first estate of inheritance within the meaning of the said Act; to wit, to him and his heirs; under which, or derived wherefrom, there was not on the said 1st Nov. 1838, or during the two months ending on that day, any such estate or interest as in the said Act is defined to be a perpetual estate or interest for the purposes of said Act: by reason of which said premises, and by virtue of the said Act of Parliament, the said land became liable to and was charged with the payment of a certain annual sum or rent-charge, to wit, the sum of £24 7s. 6d. sterling; being three-fourths of the aforesaid annual amount of tithe composition, so as aforesaid assessed and applotted upon the said parcel of land: and the said rent-charge became payable by the defendant, in respect of his said estate or interest in the said land, and was to be paid on 1st day of November, 1838, in one entire payment, and in subsequent years by two equal half-yearly payments to the plaintiff, as such lay impropriator; averment,—that on 1st November, 1839, the sum of £48 15s., being the amount of two years of the said rent-charge, became due and payable by the defendant, in respect of such estate as aforesaid, to the plaintiff;—of all which the defendant had notice: whereby, and by reason of the same being unpaid, and by force of the said Acts of Parliament, an action had accrued, &c. The second count was like the first, but stated the defendant's liability as having the first interest equivalent to a perpetual interest, within the meaning of the 1st & 2nd Vic. c. 106. The third count omitted the statement of the applotment and assessment, and alleged that the defendant was indebted to the plaintiff in the further sum of £48 15s. for two years amount of rent-charge, in lieu of tithe

composition, duly assessed and applotted on certain lands, in the parish of *Ballinaboy*, whereof the plaintiff was lay impropiator, and wherein the defendant had, on 1st November, 1838, the first interest equivalent to a perpetual interest within the meaning of the said Act.

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SHANNON
v.
DOWDEN.

The defendant pleaded, first, the general issue; secondly, *actio non*, because he says that heretofore, to wit, on the 30th day of December, in the year of our Lord, 1833, to wit, at *Bandon*, in the county of Cork, pursuant to the statutes then in force, relating to the establishment of compositions for tithes in *Ireland*, a certain composition for all tithes arising, growing, and payable within the parish of *Ballinaboy*, in said county, was made and established in said parish of *Ballinaboy*, being the parish in said several counts mentioned, and within which all the said several lands, in said several counts above mentioned, are situate. And the defendant further says, that for the full term of thirty years, next before the establishment of the said composition for tithes within the said parish of *Ballinaboy*, the several and respective lands in which the said plaintiff, in the several and respective counts of his said declaration, alleges that the said defendant has the several and respective estates and interests therein in that behalf specified, were, and each and every part thereof was held, occupied and enjoyed, without payment or render of tithes, or money, or other matter in lieu thereof; whereby, and by force of a certain Act of Parliament, made and passed at a certain session of Parliament, held within the first and second years of the reign of her present Majesty, and entitled “An Act to abolish composition for tithes in *Ireland*, and “to establish rent-charges in lieu thereof,” the said several last-mentioned lands, and every part of them, became, and

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were, and was immediately from and after the time of the passing of the said last-mentioned Act of Parliament, that is to say, immediately from and after the 15th day of August, in the year of our Lord, 1838, and have ever since that time continued to be exempt and discharged from the payment of the tithes, and composition for tithes, and the rent-charge, in lieu of composition for tithes in said several counts mentioned ; and this the said defendant is ready to verify, &c.

The third plea was similar to the second, only stating the lands to have been held without payment of tithe for sixty years. The fourth plea was to the first count ; *actio non*, because, that for thirty years next before the establishment of the composition for tithes in the said first count mentioned, the said lands had been held and enjoyed without payment, or render of tithes, or money, or any matter in lieu thereof. The fifth plea was also to the first count, and was similar to the fourth, only alleging the exemption to have been for sixty years before the passing of the Act. The sixth and seventh pleas were to the second count, and were, respectively, similar to the fourth and fifth. The eighth plea was to the third count, *actio non* ; because the composition for tithes, in said third count, alleged to have been assessed and applotted on the lands in said third count specified, was a composition for tithes, made on 13th day of December, 1833, pursuant to the Acts then in force, relating to the establishment of compositions for tithes in *Ireland* ; and that the rent-charge, in said third count mentioned, is three-fourths of a certain portion of the entire annual amount of the last-mentioned composition, which, pursuant to the Acts of Parliament, was assessed and applotted on the lands in said count also mentioned. And that for the full period of thirty years, next before the

establishment of the composition for tithes in the said third count mentioned, the said lands, in said third count mentioned, were held occupied and enjoyed without payment or render of tithes, or of money, or of other matter in lieu thereof. The ninth plea was similar to the eighth, alleging the exemption to have been for sixty years before the establishment of the composition. The tenth plea was to the first count, traversing the allegation as to the defendant's estate. The eleventh plea was to the second and third counts; traversing the allegation of the defendant having the first interest equivalent to a perpetual interest, within the meaning of the Act, in the second and third counts in that behalf respectively mentioned.

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v.
DOWDEN.

The plaintiff demurred generally to the second plea, so far as the same professed to be an answer to the first count of the declaration, and to the fourth plea; and replied to the third plea, so far as the same professed to answer the first count, and to the fifth plea, *preclusion*; because that at the time of, and for sixty years preceding the establishing of the composition for tithes in said first count mentioned, and upon and during the 13th of December, 1833, and for sixty years then next preceding, the tithe of the said lands in the said first count mentioned, was payable and of right ought to be paid to the said plaintiff and those under whom he claims. And this he is ready to verify, &c. To the second and third pleas, so far as the same professed to be an answer to the second count, and to the sixth and seventh pleas, the plaintiff replied, that the composition in the first and second counts mentioned and the several compositions in the second, third, sixth and seventh pleas mentioned, were and are the same composition; and that the same having been duly appealed from

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under, and in pursuance of the several acts relating to tithe composition in Ireland, the same was afterwards on the 24th of June, 1834, duly confirmed by the decree of the Lord Lieutenant and Privy Council, pursuant to the said Acts of Parliament; and that the tithe of the said lands in the second count mentioned, having been continually claimed and demanded for and during one whole year next preceding the establishment of said last mentioned composition, and a suit having been theretofore pending in the Equity side of the Court of Exchequer for the recovery by the said plaintiff of the tithe of the said lands in the said second count of the said declaration mentioned, for the years 1832 and 1833, afterwards, and after the establishment of the said last mentioned composition, and while the said suit was so pending as aforesaid, to wit on the 10th of August, 1837, it was agreed between the plaintiff and the defendant, who was then the person liable to the payment of the composition applotted on said last mentioned lands, as well for the portion of said lands in the occupation of said defendant as for the portion of the same lands then in the possession of his undertenants, by and with the privity and consent of the said undertenants, that the said defendant should pay to the plaintiff in lieu of all tithes and tithe composition claimable by the plaintiff in respect of the said last mentioned lands, a sum equal to the amount of the composition applotted on said last mentioned lands for three years, with a reduction of £30 per cent thereon. And that the defendant afterwards, to wit, &c., in pursuance of the said agreement, paid the said sum equal to the said three year's amount, with such reduction as aforesaid; and the said plaintiff received the same in lieu of all tithe and tithe composition

claimable by him in respect of said last mentioned lands. The plaintiff also replied to the second and third pleas so far as the same professed to be an answer to the third count of the declaration, and to the eighth and ninth pleas, that at the time of, or within one year next before the establishment of the composition for the tithes of the said parish in the said third count mentioned or referred to, and at the time of the establishment of the several compositions in the second, third, eighth, and ninth pleas respectively mentioned, which are the same compositions in said third count mentioned and referred to, and upon and during the 13th December, 1833, and for one whole year then next preceding, no exemption or discharge of the said lands in the said third count mentioned was acted on. And this he is ready to verify, &c. The plaintiff tendered issue in fact on the tenth and eleventh pleas.

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 v.
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The defendant by his rejoinder demurred specially to the replication to the third and fifth pleas; he joined in the demurrers to the second and fourth pleas; he demurred specially to the replication to the second and third pleas as to the second count, and to the sixth and seventh pleas; and rejoined to the replication to the second and third pleas to the third count, and to the eighth and ninth pleas, an exemption of the lands from payment of tithes for one year next before the establishment of the composition for tithes in the third count mentioned, and upon the 13th December, 1833, and for one whole year then next preceding; and this he is ready to verify, &c. The rejoinder joined the issues tendered by the replication to the tenth and eleventh pleas.

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The rebutter joined in the demurrer taken by the rejoinder, and pleaded that at the time of the establishment of the composition for the tithes of the said parish, and upon the 13th December, 1833, and for one whole year then next preceding, no exemption or discharge of the said lands was acted on as in the replication set forth, and upon this he tendered an issue in fact.

The defendant joined this last mentioned issue.

The case now came on to be argued, upon the demurrer to the second and third pleas.

Reeves and *Leslie*, for this demurrer.—The pleading is framed on the 18th section of 1 & 2 Vic. c. 109 (*a*), and

(*a*) 1 & 2 Vic. c. 109, s. 18, enacts, “that all prescriptions or claims of, or
 “ for any *modus decimandi*, or of or to any exemption from, or discharge of
 “ tithes, shall, in all cases whatever, be sustained, and be deemed good and
 “ valid in law, upon evidence, showing, in cases of claim of a *modus deci-*
 “ *mandi*, the payment or render of such *modus*; and in cases of claim to
 “ exemption or discharge, the enjoyment of the land without payment or
 “ render of tithes, money, or other matters in lieu thereof, for the full period
 “ of thirty years, next before the establishment of a composition for such
 “ tithes under the Acts for that purpose made, unless, in the case of a
 “ claim of a *modus decimandi*, the actual payment or render of tithes in
 “ kind, or of money, or other thing differing in amount, quality, or
 “ quantity, from the *modus* claimed; or in case of claim to exemption or
 “ discharge, unless the render or payment of tithes, or of money, or
 “ other matter in lieu thereof, shall be shown to have taken place at
 “ some time prior to such thirty years; or it shall be proved that such
 “ payment or render of *modus* was made, or such enjoyment was had by
 “ some consent or agreement expressly made or given for that purpose
 “ by deed or writing: and if such proof in support of the claim of
 “ exemption, shall be extended to the full period of sixty years, next
 “ before the establishment of such composition, such claim shall be
 “ deemed absolute and indefeasible, unless it shall be proved that such
 “ payment or render of *modus* was made, or such enjoyment was had by
 “ some consent or agreement, expressly made or given for that purpose
 “ by deed or writing; and where the render of tithes or compositions
 “ for tithes might have been, in case this Act had not been made,

those pleas are bad on general demurrer, because no plea of exemption in the language of this section, is given by the Act, and it is only the evidence of a prescriptive exemption that is the subject of the section. Before the Act was passed for the establishment of tithe composition, both exemptions and discharges existed; some temporary, others perpetual; monastery lands were privileged from payment of tithe, but at the abolition of monasteries, the crown took possession of the lands annexed to them; and the statute 33 Hen. VII. st. 2, c. 5, continued the exemption of these lands in the hands of private persons; but, if such persons made leases of them, they then became subject to the payment of tithe; except in this way, a lay person could not be altogether exempt from tithe, but might have been discharged by payment of a composition real. When the Tithe Composition Act, 4 Geo. IV. c. 99, passed, there might have been an exemption or a discharge from tithe; but the party relying on either, was bound to go

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“ demanded by any archbishop, bishop, dean, prebendary, parson, vicar,
 “ or other corporation sole, whether spiritual or temporal, or by the said
 “ ecclesiastical commissioners; then, every such prescription or claim
 “ shall be valid and indefeasible, upon evidence, showing such payment
 “ or render of *modus* made, or enjoyment had, as is herein-before men-
 “ tioned, applicable to the nature of the claim, for and during the whole
 “ time that two persons in succession shall have held the office or benefice,
 “ in respect whereof such render of tithes, in kind, might have been
 “ claimed, and for not less than three years after the appointment and
 “ institution or induction of a third person thereto; provided always,
 “ that if the whole time of the holding of two such persons shall be
 “ less than sixty years, then it shall be necessary to show such payment
 “ or render of *modus* made, or such enjoyment had, not only during the
 “ whole of such time, but also during such further number of years,
 “ either before or after such time, or partly before and partly after, as
 “ shall with such time be sufficient to make up the full period of sixty
 “ years; and also for and during the further period of three years,
 “ after the appointment and institution or induction of a third person to
 “ the same office or benefice, unless it shall be proved that such payment
 “ or render of *modus* was made, or such enjoyment was had, by some
 “ consent or agreement expressly made or given for that purpose by
 “ deed or writing.”

1842. through his case strictly, both in pleading and in proof;
 SHANNON *Bosanquet on Tithes*, 74 & 75; *Shelford's Real Property*
 v. *Acts*, 27.
 DOWDEN.

[BRADY, C.B.—These pleas are framed upon the notion, that the Act of Parliament gives a discharge because the tithes were not paid. Non-payment for sixty years may be evidence of the exemption, but I think the defendant should show the exemption to have existed.]

The Court called on the defendant's counsel to sustain the pleas.

Collins, Q.C., and *O'Leary*, for the defendant.—The policy of the clauses introduced into the Rent-charge Act, was to put an end to the necessity which existed at common law, of tracing the title to exemptions; and we think this policy is apparent from the 18th section, taken in conjunction with the 22nd(a), and that whenever the tithes had not, in fact, been paid for a certain period before the composition, the fact of non-payment was to exempt the lands for ever. The only answers that can be given to the plea of non-payment for thirty or sixty years, are those prescribed by the statute itself; and the defendant must state upon

(a) Sect. 22, "And be it enacted, that in all proceedings to be taken after the passing of this Act, for the purpose of determining the exemption or discharge of any lands from tithes, it shall be sufficient to allege that the modus, or exemption, or discharge claimed, was actually exercised and enjoyed, for such of the periods mentioned in this Act as may be applicable to the case. And any provision, exception, incapacity, disability, contract, agreement, deed or writing herein mentioned, or any other matter-of-fact or law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, shall be specially alleged and set forth, and shall not be received in evidence or any general traverse or denial of the matter claimed."

his plea the ground of discharge upon which he relies. It would be useless to burden the record with a statement when you are not bound to prove what is mentioned in it. We might state any case that we thought proper, as no issue could be taken upon any of our allegations; the only essential part of our case would be non-payment for thirty or sixty years. [BRADY, C.B.—All you say is, that the exemptions commenced on the day when the Act of Parliament commenced.] That allegation is immaterial; it is like an allegation *virtute cujus*. The Act confers a new title upon us; if we have drawn a conclusion from the facts, it is merely argumentative pleading, and cannot be taken advantage of upon general demurrer; Bac. Ab. "Pleas," I. 5, Alleyn, 33; 2 Saund. 319. [BRADY, C.B.—The Act gives you an easy mode of proof, but you treat the Act as giving you an exemption. You may allege a prescription from time to which the memory of man runneth not to the contrary, and prove that you made no payment for sixty years, instead of going back to the time of Richard I.] There are several cases on the English statute, of prescription and tithes; 2 & 3 Wm. IV. c. 71; 2 & 3 Wm. IV. c. 100. *Wynants v. Lindon* (a); *Thorpe v. Mattingley* (b).

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BRADY, C. B.—We are of opinion that these pleas must be disallowed, upon the ground that these are not the pleas given by the Act of Parliament. The matter occurs to my mind so plainly, that I should be unwilling to occupy the public time in discussing it; but as it is a matter involving such important rights, we may go into it a little more fully than we otherwise would. The pleas are framed on the assumption, that the Act

(a) Law Journal, 121.

(b) 2 Y. & J. 438.

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gives an exemption *de novo*, on mere non-payment for the time therein specified. They do not, in my mind, give any such exemption; the words are so plain that they would satisfy any man. It is a limitation, providing an easier mode of proof than would otherwise offer. (reads section 18). Again, in the subsequent section matters are treated of in the same way. Section 22 provides, that it shall be sufficient to allege, in all proceedings, that the modus or exemption or discharge claimed, was actually exercised and enjoyed for such of the periods mentioned in the Act as may be applicable to the case. I cannot conceive how any framer of an Act can use plainer language. The enjoyment alluded to in that section should not be a mere non-payment, but a legal exemption. Section 19th affords an answer to the defendant's construction, that a new exemption is given by this Act. In the present case it appears that the composition was made long before the passing of this Act; and therefore it appears that no exemption was enjoyed before the Act was passed, if the Act, for the first time gives a new right. We are referred to the cases on the *English* Acts: they are similar to this: the words "as of right" which occur in the *English* Act are not in this Act; but there are words tantamount; and the Courts in *England* held that a plea, stating the holding was *of right* was sufficient within the words of the Act. But here he has not pleaded an enjoyment in the words of the Act. It is said that the Courts use language as if the Act conferred the right; that is too strong:—for, showing a mere tortious intrusion, always resisted, would not be within the Act. Upon these grounds I am of opinion that the Act has not been rightly pleaded, whether the defendant should plead an old exemption or plead in the words of the Act. It has been

urged that these pleas may be sustained on general demurrer, because as was urged by Mr. *Collins*, it appears on the plea that circumstances exist which would entitle us to say that the defendant was discharged. But which of the three methods of discharge stated in the above section, exemption, modes or discharge, shall we hold to be right? Again, the pleader has taken upon himself to draw his own conclusion, that by force of the Act he enjoyed an exemption, which he shows never to have existed before. How can it be said that this is only ground of special demurrer? On these grounds I am of opinion, that these pleas must be disallowed.

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RICHARDS, B.—I am of the same opinion with my Lord Chief Baron; and I would merely ask in addition, what this defendant claims by his pleas? He claims an exemption by the fact of non-payment alleged in his plea; he ought however to have alleged the enjoyment of an exemption, not of mere non-payment. Here he does not allege the enjoyment of any such right; but he claims an exemption as created from 15th August, 1833, and not as existing before. On these grounds I think the pleading is defective.

Allow the general demurrer taken *ore tenus* to the pleas from the second to the seventh inclusive.

Collins, Q. C., asked permission to amend the pleas within a limited time.

Leslie.—We ought to have the full benefit of our general demurrer and to have judgment on the whole record.

RICHARDS, B.—We will permit the defendant to amend, and order that he shall pay the costs within a week after taxation.

1842.

EXCHEQUER
OF PLEAS.
Sat. Jan. 29.

MURPHY v. MEREDITH.

Where the plaintiff, an attorney, had applied for payment of a bill of costs, not taxed, some of the items of which, it was admitted by the plaintiff in his application, were barred by the Statute of Limitations, others not, and the defendant had written in reply, "Mr. P. will attend to tax your costs, which will be best for both parties, as the one will know what he is to give and the other what he is to receive." Held that this was a sufficient acknowledgment in writing to take the case out of the Statute of Limitations, 3 & 4 Wm. IV. c. 27.

THIS was an action of assumpsit, by an attorney, for the amount of a bill of costs for business done by him for defendant. The costs were composed of several items, some of which were for business done more than six years before the bringing of the action; but the plaintiff relied upon the following communications as taking the case out of the Statute of Limitations. The first was a letter from the plaintiff to the defendant, dated 9th May, 1840, in which the plaintiff said "I dare say you must almost forget that I have a demand upon you for a bill of costs, to which, if you were so disposed, you might almost plead the Statute of Limitations; that, however, is my own fault. I take the liberty to inclose the account of my small demand against you." This amounted to £62. The defendant, through a Mr. Palmer, offered the plaintiff a sum much less than his demand in full, for the amount due to him; and the plaintiff then wrote another letter to the defendant as follows:—

"28th October, 1840."

"I was surprised at the smallness of the sum offered by Mr. Palmer. I am prepared to prove that you are indebted to me in a sum of four times the amount. —I am aware some of the matters are beyond six years,

“but I take it for granted that you, an honourable and
 “high-minded gentleman, will not take advantage of
 “the Statute of Limitations against me.”

1842.
 MURPHY
 v.
 MEREDITH.

To this the defendant replied in the following letter
 to the plaintiff.—

“1st November, 1840.”

“I found your letter here on my return home. Mr.
 “Palmer will attend for me to tax your costs; which
 “will be best for both parties, as one will know what
 • “he is to pay, and the other what he is to receive.”

In the ensuing February the plaintiff furnished a bill
 of costs amounting to £112, with the usual notice, dated
 1st February, 1841, calling on the defendant to pay it.
 The defendant lodged a sum in Court to cover part of
 the plaintiff's demand and pleaded the Statute of Limi-
 tations to the remainder. The case had been tried at
 the last assizes for the county of *Kerry*, and the jury
 had found a verdict for the plaintiff, subject to the
 opinion of the Court above whether there was evidence
 to take the case out of the Statute of Limitations.

The *Solicitor-General*, and *Hickson*, Q. C., now showed
 cause against a rule obtained on a former day for a new
 trial, on the ground of misdirection. The recent Statute
 of Limitations makes no alteration in the sort of acknow-
 ledgment which shall be sufficient to take the case out
 of the Statute; but only requires the acknowledgment
 to be in writing. The direction of the learned Judge
 was right, *Frost v. Bengough*(a).

(a) 1 Bing. 266.

1842. *Bennett*, Q. C. and *Henn*, Q. C., for the defendant.—
 { MURPHY
 v.
 MERRIDITH. The letter relied on is not sufficient to take the case
 out of the Statute. There is no promise to pay, nor
 an acknowledgment of an ascertained debt. *Fearn v.*
Lewis(a); *Morrell v. Frith*(b); *Hellings v. Shaw*(c);
Miller v. Caldwell(d); some items of the account were
 barred; others were not, and the letter might only mean,
 let me see how the account stands, and I will pay the
 balance. [PENNEFATHER, B.—There must be an explicit
 acknowledgment of a debt due but it is not necessary
 that the amount of the debt be ascertained]. It is not
 an absolute promise to pay more than the costs which
 appeared due on taxation, and the costs were never
 taxed at all. The declaration should have gone on to
 state that the costs had been taxed.

BRADY, C. B.—We are all agreed that the letter of
 1st November, amounts to an acknowledgment within
 the Statute. All the authorities go to is, that the
 writing must refer to the subject matter of the cause
 of action; and be one from which a promise to pay may
 be inferred; *Colledge v. Horne*(e) is very like the present
 case. The justice of the case requires that a verdict be
 entered for £54, and that the defendant pay the costs
 of the motion.

(a) 6 Bing. 349.

(b) 3 M. & W. 402.

(c) 7 Taunt, 608.

(d) 3 Dow. & R. 267.

(e) 3 Bing. 119.

COLEMAN, Petitioner—MASON, Respondent.
 ROCHE & O'GRADY, Petitioners—SAME Respondent.

1842.
 EQUITY EX-
 CHEQUER.
 Tues. 1st Feb.

THE petitioner in the first matter was a judgment creditor of the respondent, and had obtained a conditional order for a receiver under the sheriff's act, on the 30th November, 1835, which was made absolute on the 10th February, 1836. A Mr. *Gleeson* was thereupon appointed receiver in that matter, over certain lands called *Cooleen*, in the county of *Limerick*, of which the respondent was tenant for life. Some time after the appointment of the receiver, a Mr. *Harte*, who was a relation of the respondent, entered into an arrangement with *Coleman*, and passed his promissory note to him on the 10th August, 1836, payable at three months, for £100, to secure *Coleman's* demand, and thereby prevent the lands being let to a stranger. The lands were then let to one of the respondent's family. The petitioners in the second matter were also judgment creditors of the respondent, but were prior to *Coleman*; they, on the 25th May, 1837, obtained a conditional order to extend the receiver to the second matter, which order was made absolute on the 18th June, 1837. It appeared by the first account passed by the receiver, that he had received out of the said lands, from the 1st May and 1st July, 1836, to 1st May and 1st July, 1837, a sum of £81 5s. 7d., and that the arrears then remaining due, to the last of these gale-days, amounted to £34 7s. 4d., and that at foot of such account a balance of £51 17s. 7d., or thereabouts, remained in his hands, exclusive of such arrears, which

A judgment-creditor who has obtained a conditional order to extend a receiver in another matter to his demand, which order is afterwards made absolute, tho' prior to the creditor in whose matter the receiver had been first appointed, is not entitled to the arrears of rent due at the date of the order extending the receiver, and subsequently received by the receiver.

In such a case the right of the creditor who extends the receiver, attaches at the date of the conditional order for appointing him.

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balance was lodged in Court, to the credit of these matters. By the receiver's second account it appeared that the rents due up to the gale-days in May and July, 1838, and all the arrears returned in the first account, were paid up to the receiver. The respondent died in 1838, before any other gales became due, and the receiver was thereupon removed. The petitioner *Coleman* had not received any part of the rents, but had been paid his demand by the amount of Mr. *Harte's* promissory note, which *Harte* having paid, he took an assignment of his judgment from *Coleman*. No administration had been taken to the respondent.

On the 3rd December last, an order had been obtained by the petitioners in the second matter, that the accountant-general should draw upon the bank of Ireland in their favour for a sum of £51 17s. 7d., then in bank to the credit of these matters, and that the receiver should pay the said petitioners £16 1s. 8d., being the balance of a sum of £43 7s. 6d. due on the last account passed by him, after deducting thereout a sum of £22 5s. (to which the receiver had been declared entitled by an order of the 18th January last), and the sum of £5, due for vacating his recognizance.

Mr. *Thomas Fitzgerald*, on behalf of *Richard Harte*, now moved that proceedings under the order of the 3rd December 1841, might be stayed, and that it might be referred to the remembrancer to inquire and report who is the person now entitled to receive the sum now in bank to the credit of these matters, and also the sum now in the receiver's hands on foot of the rents of the lands and premises over which he was appointed; and that *Richard Harte* might be declared entitled to stand in the place of

the petitioner in the first matter, so far as regards the rents and profits of the lands in the petition mentioned, which accrued due prior to the order in the second matter, extending the receiver in the first matter thereto, in priority to the petitioner in the second matter ; without prejudice to such claim, if any, for costs, as the attorney for the petitioner in the first matter may have against the funds in court, or in the receiver's hands.

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Independently of the assignment of *Coleman's* judgment, Mr. *Harte*, having paid the debt it secured, would now be entitled to that security against the principal debtor ; *Copis v. Middleton(a)*. In *Barry v. Wilkinson(b)*, it was held that the order extending a receiver on a judgment, attaches the arrears of the rent then in the tenant's hands for the benefit of the person obtaining it ; but that case is reviewed by the Court in a subsequent part of the same work(c), and placed upon its own peculiar grounds. The *Master of the Rolls* has in two cases decided that a creditor coming in under the sheriff's act, did not affect bye-gone rents ; *Rule v. Henry(d)* ; *Marquis of Sligo v. O'Malley(e)*.

The Court called on the counsel on the other side.

D. R. Kane and *O'Shaughnessy*, for the petitioners in the second matter.

The rents were realized by us, and Mr. *Harte* lay by ;

(a) 1 Tur. & Russ. 224.

(b) 3 Ir. L. R. 121.

(c) lb. 564.

(d) 1 Flan. & Kelly, 97.

(e) 3 Ir. Eq. Rep. 527.

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this is not a case of principal and surety. [PENNEFATHER, B.—Any one paying a debt for another has a right to stand in the stead of the creditor he pays off. If a surety pays off a demand, he is only a simple contract creditor at law, until he gets an assignment of the security for that demand; but in equity he is considered as having a right to the security he has paid off. The rents were realised by *Coleman*.] Only £7 4s. 10d. was received by the receiver before he was extended; and the Court must distribute the fund according to priorities, as in a creditor's suit: it is the 38th section which makes a difference between rents *accrued* and rents *received*. The 32nd section requires that the rents shall be distributed according to the priority of the creditors, and if there were no other section than this, the Court should give the funds to us. [PENNEFATHER, B.—The whole must be construed together. The person who sets the matter in motion, who first applies to the Court, and attaches the rents, ought to be given the reward of his diligence, and have those rents which his diligence gave him.] But does *Harte* stand in such a situation as entitles him to avail himself of this security? *Harte's* conduct has injured the petitioners in the second matter; for the lands, owing to his interference, have been let at a low value. *Coleman's* judgment has, at all events, been satisfied. How could the judgment creditor swear the sum was due, so as to revive the judgment at law? [PENNEFATHER, B.—It is unsatisfied on record: that is the distinction between a bond and a judgment: the former is satisfied at law by payment of the amount, the latter is not. The sum is due to the equitable assignee by the conuzor, who has never paid it. Your argument would go to prevent the assignment of judg-

ment at all]. The principle has been much discussed in *Copis v. Middleton*(a) and *Dowbiggen v. Bourne*(b).

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The CHIEF BARON was absent.

PENNEFATHER, B.—All that I mean to be considered to say in this case is, that Mr. *Harte* is entitled to stand in the place of the petitioner in the first matter, and that we must consider the case as if *Coleman* were himself in Court upon this motion. *Coleman* obtained a conditional order, which afterwards was made absolute in 1836, for a receiver, upon his judgment against the respondent. In May, 1837, *Roche* and *O'Grady* applied for a receiver, in respect of their demand, and on the 20th May, 1837, obtained a conditional order for extending the receiver to the second matter. Their right, so far as regards the distribution of this fund, thereby attached upon it; that conditional order being afterwards made absolute; for this Court has held that the right of a creditor attaches from the date of the conditional order; therefore, the date of the conditional order of 25th May is to be considered as the foundation of the right of *Roche* and *O'Grady* to a distribution of this fund. If they had come in here at the same time with *Coleman*, they would have a right to be paid in priority to him; but not having done so, his right to obtain what he now requires will depend on the construction which we are to give the 38th section of the 3 & 4 Wm. IV. c. 55. That section was made to enable the Court to administer the funds where a prior creditor shall have obtained a receiver

(a) 1 Turn. & Russ. 224.

(b) 2 Y. & C. 462.

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over his debtor's property. And it was enacted that in case any money shall be received by the receiver so appointed by the prior creditor, it shall be distributed and paid under the orders of the Court, as it would have been if such further order extending him had not been made, &c. Now in construing this section, we are called on by the representatives of *Coleman* to say that the words "money received" in the Act mean "rents due;" and I think that is putting a proper construction on the statute. I think if we were to hold otherwise we should greatly incumber the parties, and occasion much trouble and expense in administering the fund. Still that trouble and expense would not be a reason for putting a construction on the statute different from that which we think most proper, upon the entire Act taken together. The first person who applies to this Court for a receiver over the lands of his debtor is entitled to the rents due before any such order is subsequently obtained by a prior creditor. In principle there is no difference between the actual receipt of rents and the being in a condition to receive them; the default of the tenants in not having actually paid those rents cannot alter the rights of the parties. I think also this construction is strengthened by the nature of this execution (for it is an execution), and I think it ought to be governed by what was the rule respecting the proceeding in place of which the receiver was substituted. If this were a contest between two *elegit* creditors, the *elegit* creditor who came in last could only recover rent from the time when his *elegit* was sued out, that is, from a time posterior to that at which the *puisne* creditor has sued out his; and it would make no difference whether the rents were in the pocket of the first *elegit* creditor or in the hands of the tenants

of the lands. I think that principle affords a guide for the construction of this Act of Parliament, and that we ought to incline to follow it when it saves great expense, and avoids the inquiry which would be necessary as to the time when the rents were received. The attention of this Court was drawn to the point when the Master of the Rolls had a seat upon this Bench, and we then thought the words "rents received" in the 38th section meant "rents due." That case has been since followed and adopted by his Honour in the case of *Rule v. Henry*, in 1840. It is very desirable that there should be an uniformity of decision in the Courts on the construction of this Act, and we ought not, I think, to alter the construction already put upon it. I think therefore Mr. *Harte* has made out his case, and that he is entitled to have those rents which fell due before 1st May, 1837, that is, before the order for extending the receiver to the second matter. I mention the Statute of 3 & 4 Victoria, c. 105, that it may not be thought we had overlooked it; but this case must be decided as if that Act had not been made.

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RICHARDS, B.—I concur in the construction which Baron *Pennefather* has put upon this Act. The case has been ingeniously argued; but I have already expressed my opinion on the point, and was under the impression that in administering the rents brought into Court by the receiver appointed by the Act, we had acted upon that principle, and thought that this question had not been so long undecided. I find accordingly that this question was decided soon after the passing of this Act, and it is satisfactory to find that our decision was not receded from by the Master of the Rolls, but has been

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acted on by him to the present period. Nothing can be more plain than the words of His Honor in the case referred to. I think the rights of the creditors must have reference to the dates of their conditional orders, and I do not say that a creditor who obtained his order on 25th May, 1837, can insist upon rents accrued due on the 1st January, 1837, or 1st May, 1837. There being no insolvency alleged or any special case made, I think these rents must belong to the prior creditor; and that *Harte* is entitled to the rents which accrued due and were received by the receiver prior to the conditional order obtained by *Roche* and *O'Grady*. We must, therefore, set aside the order of the 3rd December, and the money must be paid to Mr. *Harte*. I dare say the parties will arrange between themselves the proportions in which they are to be paid; otherwise we will direct a reference to the officer for that purpose.

LEFROY, B.—I concur with the opinion expressed by my brethren, which, it appears is in accordance with that of the Master of the Rolls; but as the question is one of great importance it is right I should express the reasons upon which I have come to that conclusion upon it. I confess I should have had much difficulty if it were necessary to decide this case on the meaning of the words “received,” but I think we may give the Act a construction without departing from the strict literal meaning of the words, by the aid of a section in the body of the Act. The question is, whether the rents belong to the petitioner in the second matter, or to the party standing in the place of the petitioner in the first matter. *Harte* is now an assignee of *Coleman*, and any question as to his being an equitable surety is out of the question.

Whether we look back to the rights of judgment creditors at common law, or to those of an *elegit* creditor at common law, or whether we look to the words of this Statute, in every point of view the petitioner in the first matter is entitled to those rents. At common law a judgment creditor was not entitled to an account of rents of the lands of his debtor until he had first issued an *elegit* on the judgment: this Statute which gives the judgment creditor the right of having a receiver appointed instead of issuing an *elegit*, does not give him bye-gone rents. The receiver may receive, but has no title to retain them. See then how that principle applies to the case of a competition such as we have now before us. The words of the section are, “in case “any sum shall be received by any such receiver before “an order shall be made to extend him to the matter “of another petition, the money so received by him “shall be distributed and paid, under the orders of the “Court, as it would have been if such further order “extending him had not been made.” If it rested there, there would be no great difficulty; but it goes on to say that in distributing the funds *thereafter* to be received, “the Court shall have regard to the rights of the person or “persons at whose instance the order extending the receiver “was made.” The question then is, how are they to be distributed, having regard to the rights of the person obtaining the extending order. And what are his rights? He can have no right to bye-gone rents; it is the receiver in the first matter who should receive them; his rights can only be taken away by the rights of the other judgment creditor, and they only attach from the time of extending his receiver. Therefore, giving the words “received by him” in the 38th section, their literal

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meaning, it can only be said that distribution must be made according to the rights of the parties. The words are "the Court shall have regard to the rights of the person or persons at whose instance the order extending the receiver was made." Precisely so:—according to their rights as judgment creditors, not according to the date of the judgment, which does not draw after it any rights to the rents, but from the date of the order for extending the receiver. We must not construe the sections of this Act in an isolated manner, but one with the other. In my own judgment, then, and upon the opinion of the Master of the Rolls, I am bound to concur in establishing this construction of this Act, and to hold Mr. *Harte* entitled to the rents which accrued due before the appointment of the receiver in the second matter(a).

No costs of this motion.

The parties subsequently agreed upon the portion of the fund to be paid to Mr. *Harte*, and the order of the 3rd December was therefore allowed to stand.

(a) See *Keough v. Waring*, 1 Jo. & C. 189.

M'DERMOTT, Petitioner—MOYLAN, Assignee of
FAHAN an Insolvent, Respondent.

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EQUITY
EXCHEQUER.
Wednes. 2 Feb.

MR. T. B. C. Smith, with whom was Mr. M. O'Donnell, for the petitioner in this matter, moved to make absolute a conditional order for a receiver to be appointed over certain leasehold property of the defendant. In *Hilary* Term, 1841, the petitioner had recovered judgment against *Fahan* in an action on two bills of exchange, for £124 10s. 6d. On the 28th June, 1841, *Fahan* had filed his petition in the Insolvent Court, and on July following, was discharged as an insolvent; the respondent having been appointed his assignee. The respondent in his affidavit to show cause relied upon the exception contained in the latter part of the 22nd section of 3 & 4 Vic. c. 105.

On application by a judgment creditor for a receiver, the court will not consider the year limited by 3 & 4 Vic. c. 105, sec. 22, to have elapsed, unless it has elapsed before the date of the conditional order for appointing the receiver.

We are clearly entitled to a receiver as by the 3 & 4 Wm. IV., c. 22, a judgment is made a charge upon chattels real. The respondent seeks to do away the effect of the section as regards us, by the proviso in the latter part, for he says, that we are not entitled to any priority against creditors prior to the 1st November, 1840. But the word "creditors" in this clause means not simple contract creditors, but those creditors who have charges not being mortgages or other specialties, affecting the lands; and this construction of the Act is strengthened by the 19th & 28th sec. of the same Act. The Act was intended to protect prior mortgagees, not to give a benefit to mere simple contract creditors.

Mr. J. D. Fitzgerald, for the respondent.—This motion

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cannot be sustained, for the 22nd section of the Act contains a proviso, that "no judgment creditor shall be "entitled to proceed in equity to obtain the benefit of "such charge under this Act, until after the expiration "of one year from the time of entering of such judgment."

Mr. *Smith* and Mr. *O'Donnell*. The 22nd section applies only to cases in which the creditor proceeds by bill; for this application is in the nature of an execution, not of a proceeding within that section. The Court will at all events grant us a conditional order; it is only from the time at which a conditional order is made absolute that the year is to be reckoned.

PENNEFATHER, B.—I cannot agree to that. This Court has decided the contrary principle on mature deliberation. The 22nd section of the 3 & 4 Vic. c. 105, says, that a judgment shall be a charge upon chattels real. That I take to be the meaning of the clause. Surely, the creditor may have the benefit of that charge by filing a petition. You affect a chattel interest by reason of the 21st section, and you seek to avail yourself of that charge by the 22nd section, which provides that no person shall have the benefit of this Act until a year after.

Cause allowed with costs.

The CHIEF BARON was sitting at Nisi Prius.

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EQUITY

EXCHEQUER.

Sat. 5th Feb.

SAMUEL M'DOWAL, in the year 1817, duly made and published the will hereinafter set forth; and again in the year 1828, proceeded to dictate another will also hereinafter set forth, which was reduced to writing by his direction; but he died before the second will was completed. The two instruments were as follows:—

WILL OF 1817.

The last will of me, *Samuel M'Dowal*, of *Augher*, made the 20th day of September, 1817. In the name of God, Amen. I, *Samuel M'Dowal*, do by these presents, in order to prevent all disputes after my death, make and ordain this my last will and testament.

WILL OF 1828.

In the name of God, Amen. I, *Samuel M'Dowal*, of *Augher*, in the county of *Tyrone*, Esquire, being of sound memory and understanding, do think fit to make and publish my last will and testament as follows:—

Where a testator had given several legacies by a complete will and codicils, and by a subsequent instrument, purporting to be a "last will and testament," proceeded to give several legacies different in amount, to the same legatees, but suddenly died before the second will was completed, and the ecclesiastical court granted probate of both instruments as one will: Held, that such legacies were cumulative.

[N.B. The following bequest was contained in a codicil to this will, but is here transposed.]

I leave and bequeath to Captain *Andrew Millar* my freehold property in *Strabane*,

I leave and bequeath to *Andrew Millar*, my nephew, the lands of *Skeog*, *Kilfaddy*,

1842. ARMSTRONG v. MILLAR.	<i>Augher, Lisbane and Skeog, Kilfaddy, near Tullock, to him and his heirs for ever.</i>	<i>Glendarish, Coolnamudda, also my property in Strabane for his own proper use for ever.</i>
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First—To the Rev. *Andrew Millar* in trust for his three daughters as follows :—To *Eleanor M^c Moran*, widow, the sum of £2000 sterling.

To <i>Anne Thompson</i> the sum of £2000 sterling. To <i>Martha Millar</i> the sum of £2000 sterling, the same to be at their own disposal to their issue, should they have any ; if not, the interest of said respective sums belonging to the said <i>Anne</i> and <i>Martha Millar</i> , for and during each of their natural lives ; and the principal sums belonging to which of them shall happen to die without such issue, I order and direct that the said principal sum shall go to, and devolve to the other sister who shall have children or child, as she shall appoint ; and in case of her death without such will, then the said	I leave and bequeath to <i>Anne Thompson</i> , my niece, the sum of £2000 sterling, the interest thereof only to be paid to her during her life time ; and at her decease to go to, and be paid to my niece <i>Martha Millar</i> ; but in case the said <i>Martha Millar</i> shall die before the said <i>Anne Thompson</i> , then, and in that case I empower the said <i>Martha</i> , at any time, during her life to leave and bequeath said sum to any person she may think fit.
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principal sum to be divided to each of her children, share and share alike. If both the said *Anne Thompson* and *Martha Millar* shall die without lawful issue, then in that case my will is that the said principal sum or sums so bequeathed to them, or either of them, shall at their decease go to, and belong to, *Eleanor M'Moran*, and her issue, share and share alike.

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Secondly,—To *James M'Dowal*, my natural son, £5000 sterling, should he be living at the time of my death, and if not, the same to be paid his children, *James* and *Margaret M'Dowal*, or any other child or children of his lawfully begotten, provided they live to the age of 21, and marry with the consent of the said *James*, their father.

I leave and bequeath to *James M'Dowal* eldest son of *James M'Dowal*, deceased, who was my natural son, the sum of £500 to be paid him on attaining the age of twenty-one years. I leave to *Margaret M'Dowal*, eldest daughter of my said natural son, the sum of £300, sterling, to be paid her on attaining the age of twenty-one years, or day of marriage, provided she shall marry with the consent of my executors. I leave and bequeath to *Fanny* and *Johanna M'Dowal*, children

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of the said *James M'Dowal*, the sum of £300 each, to be paid them respectively on their attaining the age of twenty-one years, and provided they marry with consent of my executors.

Thirdly,—To *James Browne*, wheelwright, husband to *Mary Browne*, my natural daughter, £4000, the same to be put to interest for the use of their children, share and share alike, as soon as they shall come to the age of twenty-five, and be married with the consent and approbation of their parents.

I leave and bequeath to *James Browne*, of *Augher*, the sum of £300, and to his son *Mathew Browne*, my property near *Clogher*, called *Terrew* ; also all my property in the town of *Augher*, which I hold under *Sir William Richardson*, with the appurtenances thereto belonging, and in as full and ample a manner as I hold the same. To *Samuel Browne*, son of said *James Browne*, the tenements in the *Sheragh*, and the land thereto belonging, let to *Brennan*.

Fourthly,—I leave and bequeath to *Anne M'Dowal*, my natural daughter by *Bell M'Cowan*, £1000 for the use of her children, to be put to interest for the use of her

And I leave to *Anne M'Dowal*, otherwise *M'Carney*, my natural daughter by *Bell M'Cowan*, the sum of £600 to be put to interest for the benefit of her chil-

children by *Neil M'Carney*, her husband, share and share alike.

dren, and the principle to be paid them on attaining twenty-one years.

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Fifthly,—I leave and bequeath to *Mary M'Dowal*, my natural daughter, now married to *John Armstrong*, £2000 sterling, and to her issue in case she should have any; if not, to go to the issue of her sister, *Anne M'Carney*; and if said *Anne* should die without such issue, the whole principal sum or sums so bequeathed to them, to go to, and devolve to the aforesaid *James M'Dowal*, and his issue, who I also leave and appoint residuary legatee.

I leave to *Mary* my natural daughter married to *John Armstrong*, £300 to be put to interest for the benefit of her children, the principal to be paid them on attaining twenty-one years.

I leave £200 to the Presbyterian Congregation of *Carrantal*, for the keeping and repair of the Meeting House of said congregation. The said £200 to be laid out at interest, which interest is to be applied for ever in keeping the said Meeting House in good repair for the support of God's worship therein.

I leave to the congregation of *Carrantal* Presbyterian Meeting-house, and the Minister for the time being £100, the principal sum to be invested and the interest to go towards keeping the house in repair.

(Here the will of 1828, ended.)

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The testator then proceeded by the first will to appoint the Rev. *Andrew Millar*, *Captain Burnside* and *Thomas Knox Hannington*, his executors ; and *John King Irwin* of *Dublin*, to be his trustee. By a codicil to this will, the testator bequeathed all his property in the city of *Dublin*, to *Andrew Millar*, son to the Rev. *Andrew Millar*, and his heirs for ever. And by the other codicil already mentioned, dated 18th December, 1817, the testator left and bequeathed to *Captain Andrew Millar*, his freehold property in *Strabane*, *Augher*, *Lisbane* and *Skeog*, *Kilfaddy* near *Tulloch* ; to him and his heirs for ever. And left and bequeathed to *James M'Dowall* aforesaid, his household furniture, goods, and chattels, and stock of every kind, and also appointed him residuary legatee, "after paying the debts due by me, " and the aforesaid legacies, with those hereinafter to be " named and bequeathed in this or any other codicil annexed to this my will." The testator then by this and another codicil gave some further legacies, and directed that in case the amount of the debts due to him at the time of his decease, should not be sufficient to pay the general legacies mentioned in his will, then in that case he ordered the said deficiency to be deducted equally off each of the respective legacies in equal proportions to the legacies. The testator then bequeathed to *Andrew Millar* certain property, in *Dublin* and *Monaghan* in fee. In a schedule annexed to the first will, the testator stated the debts due to him in May, 1820, to amount to £20,783 10s. 10d.

A suit was instituted in the Court of Prerogative, respecting the granting of probate to the will of the testator. The sentence of the Court of Prerogative found for the validity of the first will and codicils ; and that the deceased (the testator) "having a mind and intention to

“ make a new last will and testament, and being at such
 “ time of sound and disposing mind, memory, and under-
 “ standing did, as the inception thereof on or about the
 “ 25th day of April, in the year of our Lord, 1828, dic-
 “ tate to a faith-worthy person certain testamentary dis-
 “ positions, which said faith-worthy person then in the
 “ presence, and according to the dictation of said deceased,
 “ reduced to writing, and read each and every clause and
 “ sentence of same, as so reduced to writing, truly, audibly
 “ and distinctly to said deceased who approved thereof
 “ respectively, as so written, and which said last men-
 “ tioned testamentary disposition, so as aforesaid reduced
 “ to writing, beginning ‘in the name of God, Amen,’ &c.,
 “ and ending, ‘the interest to go towards keeping the
 “ house in repair,’ is pleaded and alleged by and on behalf
 “ of the promovant in this cause, and now remains in the
 “ registry of this Court. And we do pronounce, decree,
 “ and declare that the said deceased did give, will, bequeath,
 “ devise, dispose and do in all things as therein contained,
 “ and that the said deceased after the writing thereof was
 “ proceeding to dictate to the said faith-worthy person
 “ certain other testamentary dispositions, but before he
 “ could do so, the said deceased became suddenly alarm-
 “ ingly ill, and died shortly afterwards, without finishing
 “ or completing the said then intended will, or testa-
 “ mentary disposition, being thus by the act of God
 “ prevented from so doing ; and we do pronounce, decree,
 “ and declare for the force and validity of the said will
 “ and testament, bearing date the 20th day of September,
 “ 1817, and four codicils thereto, and of the said testa-
 “ mentary disposition in writing so left unfinished and in-
 “ complete as aforesaid, and of every part thereof, as
 “ containing together the last will and testament of said

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“ deceased to all intents and purposes in law ; and we do
 “ approve of and receive the same, by this our definitive
 “ sentence or final decree, which we give and promulge
 “ by these presents, justice so requiring.”

This sentence was appealed from, and the Court of Delegates on 9th May, 1833, confirmed the sentence of the Court below. The residuary legatee died in the testator's life time.

The bill in this case was filed by *John Armstrong* and *Mary* his wife, and *Neil M'Carney*, and *Ann* his wife, against the other legatees and the personal representative of the testator for payment of their legacies, and the question now was, whether the legacies given by the will of 1817, were cumulative or not. It appeared that *James M'Dowal*, the son of the testator had died between the execution of the two wills ; and the officer had reported that the assets of the testator at his death amounted to more than £33,360.

This case was partly argued in *November* last, and having stood over for the full Court, was now argued by

Mr. *T. B. C. Smith*, Q.C., and Mr. *Peebles* for the plaintiffs ; *Mary Armstrong* and *Ann M'Carney*.

The bequests are not identical ; in the latter instrument there is a trust of the £600 for the benefit of the children of *Mary Armstrong* ; in the first instrument the bequest is given for her own benefit, *Wilde's Case*(a), or she took at all

(a) 6 Co. 16.

events a life interest in the legacy of £2000. Therefore there is considerable variation, not only with respect to the amount of the legacies, but also with respect to the disposition of them. The Ecclesiastical Court has considered the two instruments as one ; and we are to consider this as a case of will and codicil, in which legacies are to be held to be cumulative. In a case in which the Ecclesiastical Court granted probate of two instruments as constituting one will, *Ingram v. Strong*(a), the Vice-Chancellor held the legacies given in both to be cumulative(b). The general principles on which legacies are held to be cumulative are stated in *Williams or Executors*, 3rd Ed. 1020, et seq. If legacies of unequal amount be given in the same instrument, they are cumulative, *Swinburne on Wills ; Wyndham v. Wyndham*(c), *Jackson v. Jackson*(d). *Tweeddale v. Tweeddale*(e), is a very strong case. Although the Court is not to construe testamentary instruments by parol evidence, yet it is settled that regard may be had to the property of the testator, *Guy v. Sharpe*(f). Now, the first instrument gives £18,260 ; the second gives but £6,200 ; in the interval between the first and second instruments the testator's son, who was the object of a bequest of £5000, had died, and the testator had, at the time of his own death, a fund of more than £33,360, in his hands. So it cannot be contended that if the legacies were cumulative, he would have no property to pay them. This clearly shows that it was not intended to revoke the first will.

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(a) 2 Phil. 312.
(c) Finch, 267.
(e) 10 Sim. 453.

(b) 6 Sim. 197.
(d) 2 Cox, 35.
(f) Cowp. Lord B.

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Mr. *Dwyer*, for the children of *James M'Dowal*.

Mr. *Major*, Q.C., for *James Browne*.

Sir *Thomas Staples* and Mr. *Sproule*, for *Andrew Millar*,
 one of the next of kin.

All the legacies in the latter instrument are substitutional; the first will being perfect could not, in the Ecclesiastical Court be abrogated by a less solemn instrument; the second paper therefore could not be held to revoke the first, and probate was therefore granted of both. Whether this be a complete instrument or not, it is so intended in its inception, *Hurst v. Beach*(a). As far as it goes it is a substitution. When the second instrument shows by intrinsic evidence that it was intended as a substitution for the first, it is to be a substitution, and this rule applies as well to wills as to codicils, *Williams on Executors*, 1022, *Att. Gen. v. Harley* (b), *Gillespie v. Alexander* (c).

BRADY, C. B.—This case comes before us on the Remembrancer's special report. The point insisted on by the next of kin is, that the testator has substituted his second will for what he had done in respect of the parties who were legatees in the first will. The second will was not in all respects a revocation of the former will, nor can we consider that it is so, for the Ecclesiastical Court has decided that all the documents taken together constitute the will of the testator, *Samuel M'Dowal*. That having been decided by the Ecclesiastical Court, we are bound to

(a) 5 Mad. 351.

(b) 4 Mad. 260.

(c) 2 Sim. & Stu. 145.

put upon the documents the same construction that Lord Eldon did upon those in the case of *Heming v. Clutterbuck*(a), and to endeavour to construe all the instruments, taken together. This case has not been argued on the principle of will and codicil and on the amount of the legacies, as in *Ridges v. Morrison*(b), but it is argued that the instrument of 1828, being in the form of a will, is to be considered as substituted for all the legacies the legatees could have taken under the former will. I think in the first place it is right to look to the circumstances of the testator at the time, and it appears that his property had increased during the period between 1817 and 1828, and that the residuary legatee had died in that time. No other change took place as to the other persons; there is no evidence of any advancement having been made to any of the legatees, nor is there any reason to show an intention in the testator to depart from his purpose of conferring his bounty on those persons. If, then, we are to look to the circumstances of the testator, we should be against the counsel for the next of kin; but those must be disregarded if we have evidence of a clear intention to revoke the first will.

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Now, what is the nature of the instrument itself? We must look to the sentence of the Ecclesiastical Court in judging of the nature of this instrument. The Court of probate finds, first the making of the will of 1817, and the codicils thereto as having been duly made. It then finds that *Samuel M'Dowal*, having a mind and intention to make a new last will and testament, did dictate certain

(a) 1 Bligh, N. S. 479.

(b) 1 Bro. C. C. 309.

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testamentary dispositions, which were reduced into writing; and that he, after the writing thereof, was proceeding to dictate other testamentary dispositions, but before he could do so, became suddenly ill, and died shortly afterwards, without finishing or completing the then intended will or testamentary disposition. This is nothing then but the inception of an instrument, broken off by the death of the testator: of what was the ultimate disposition intended by the testator, we are totally ignorant; but we have it that he was about to make some further disposition; in other words, we are assured that this is *not* his last will. Now I do not find that any case of this exact nature has arisen in our courts; but the subject is not unnoticed in books of authority, or at least of high reputation in those matters; and I think it important to see what opinions have been given from time to time on the subject. In *Swinburne on Wills*, pt. 1, p. 10, a distinction is made between testaments which are imperfect in respect of *solemnity*, and in respect of *will* or meaning; those imperfect in solemnity being perfect except as to the formalities of attestation and the solemnities rigorously required by the civil law; and being sufficiently attested according to our law; within the other class comes the present case:—He says, “If therefore
“whilst the testator is making his will, and whilst he yet
“intendeth to proceed farther at that present, either by
“adding or diminishing any thing to or from his testa-
“ment, or by altering any thing therein, (as commonly
“men do use to put in, put out, and change many things,
“before they make an end,) he be suddenly stricken
“with sickness, insanity of mind, or other impediment,
“whereby he cannot then finish, or perfect the same,
“as he would, and so die: this his testament, being im-
“perfect in respect of will, is therefore void, even touching
“that which was done, which he did intend then to alter,

“ before he had made an end, by reason of the defect of
 “ the testator’s consent, without which the testament is
 “ not of any value. Nevertheless, not every testament
 “ which is termed imperfect in respect of will, is by and
 “ by wholly of no force; for in many cases, yea, and for
 “ the most part, such testaments are effectual for so much
 “ as is already done, as elsewhere more abundantly is con-
 “ firmed.” That is, in the seventh part of the same work,
 section 12, where it is said, “ That testament is said to be
 “ imperfect in respect of solemnity, which wanteth some
 “ of the legal requisites, necessary to the constitution and
 “ denomination of a solemn testament, of which we have
 “ already spoken ;—That testament is said to be imperfect
 “ in respect of *will* which the testator had begun, but
 “ cannot finish as he would, being prevented by death,
 “ insanity of mind, or other impediments.” He then goes
 on, “ the testament which is imperfect in respect of will is
 “ sometimes utterly void,” and then he distinguishes the
 means whereby the testament is imperfect in respect of
 will into two, “ first where the testator after he has
 “ begun to make his testament, and intending to proceed
 “ further *at that present*,” (just as here) “ is then suddenly
 “ prevented by death, &c., and secondly, when the tes-
 “ tator is not hindered at that present time of making his
 “ testament, but deferreth the finishing or perfecting thereof
 “ until *another time*, and in the meantime dieth, or other-
 “ wise becometh intestable. When the testament is im-
 “ perfect after the first manner, it may seem that the same
 “ is utterly void, even touching that which is already done ;
 “ and there is no question but that by the civil law it is
 “ void, though it were the testament of the father amongst
 “ his children. But whether it be void *jure gentium*, and
 “ consequently by that law which we use here in England,
 “ is a question not altogether undoubtful,”—and then he

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discusses that question ; “ On the contrary, others whose
 “ not only number is more exceeding, but authority and
 “ estimation more excellent, are of this opinion, that where
 “ the testator hath begun his testament, and hath be-
 “ queathed certain legacies *ad pias causas*, and intending
 “ at that time to proceed further, is then suddenly by
 “ death or other impediment prevented or hindered that
 “ he cannot finish his testament, nevertheless those legacies
 “ already made *ad pias causas*, are not thereby infringed,
 “ but do continue still firm and effectual, as if the testator
 “ had finished his testament, according to his former
 “ purpose.” So that I think, although there are strong
 authorities for holding instruments of this nature to
 be wholly void, that the more received opinion is that
 they are good so far as they go ; and we have the judg-
 ment of the learned judge of the Prerogative Court, that
 an instrument of this nature is not wholly void, but is to
 be treated as part of the will of the testator. In *Shepherd’s*
Touchstone, p. 408, indeed it is laid down that a will of
 this character is wholly void. “ If whilst the testator is
 “ making his will, and whilst he intendeth to proceed
 “ farther at that time, either by adding, diminishing or
 “ altering, he be suddenly stricken with sickness, or
 “ insanity of mind, whereby he cannot proceed, but gives
 “ it over in the midst and so he die ; it seems in this case
 “ the whole will is void.” He then quotes from *Swinburne*,
 and uses nearly the same language. “ And yet if a man
 “ begin his will, and make perfect devises to one, and then
 “ of himself he give over until another time ; or if a man
 “ make a perfect devise to one, and then die before he can
 “ make any devise to any others, it seems there are good
 “ testaments for as much as is done.” It is not easy to
 reconcile all these passages ; but I take the doctrine to

amount to this, that as far as it is done, the second will is to be considered as part of the testamentary disposition. In *Baker's case*(a) and *Linbury v. Mason*(b), an imperfect instrument was held to amount to a revocation. On those grounds I think there may be reason for letting the subsequent instrument stand so far as it goes, but where it is silent we cannot say what it was intended to effect by it. Whether the testator would have confirmed his former will by it, we cannot say, but looking to his circumstances, can we say that such would not have been the case?

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As to the claims of the next of kin, *Jackson v. Jackson*(c) has been relied upon; in that case the second will purported to be a complete instrument, and so in the *Attorney General v. Harley*(d), we may collect that each instrument was in itself complete; and there is no controversy there on that ground. In the latter case the *Vice-Chancellor* says, "The question here is whether the third instrument does not afford internal evidence that it was meant by the testatrix, not as an addition to the first instrument, but as a substitution for it. It begins with all the forms of the first instrument, with the same expressions of religious resignation, nearly in the same words. It then proceeds to appoint *Martha Harley* her sole executrix, by the same description as in the first instrument, and it then proceeds to give with little variation, the same legacies to the same persons who were the objects of her bounty by the first instrument. I think the inference irresistible that the testatrix intended the third instrument as a substitution for the first." In *Heming v.*

(a) 5 Co. 104.

(b) Comyn, 451.

(c) 2 Cox, C. C. 35.

(d) 4 Mad. 263.

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Clutterbuck(a), there was no ground to suppose that the testator meant to give any thing not given by the second paper; it was nearly in the same form as the first, and in that case as in *Brine v. Ferrier(b)*, the latter document was manifestly a substitution for the former: it contained the same amount of legacy, and was intended to apply to the same sum. This I think also appears in *Strong v. Ingram(c)*, and the judgments in page 209 of that book. The question in all the cases is, whether you can collect from the whole of the instruments taken together, an intention on the part of the testator to substitute one legacy for the other. *Fraser v. Byng(d)*.

Now, when we look to the instruments themselves, I think we have very strong grounds for holding that the second instrument is not a total revocation of the first. In the first will, *Ann Thompson* and *Martha Millar* were to take £2000, with cross remainders, in fact, between them; and in the second paper, *Martha* was not the object of the testator's present bounty, but a single sum of £2000 was bequeathed to *Ann Thompson*, with remainder after her decease to *Martha*. So that *Martha Millar*, who took £2000 by the first will, takes only a remainder in £2000 by the second. Now, I should say that there was no intention in the mind of the testator to disturb what he had given to *Martha Millar*, but rather that having an additional sum at his disposal, he intended to give it to her along with what he had already given. And with regard to the family of *James M'Dowal*, which perhaps is

(a) 1 Bligh, N. S. 479.
(c) 6 Sim. 197.

(b) 7 Sim. 549.
(d) 1 Russ. & Myl. 102.

the strongest case, I think the circumstances go a great way to show an intention that they should take additional legacies under the second instrument. The first bequest is one of £5000 to *James M'Dowall*; if living at the testator's death, and if not, to his children, provided they live to the age of twenty-one years, and marry with their father's consent. Now when the second instrument was begun, *James M'Dowall*, the father had died, and so far from his children being less the objects of the testator's care, they were equally entitled to the benefit he intended them. We find that he gives by the second will but £1400 or £1500; now there is in this respect a strong discrepancy between the documents; and even upon the ordinary rules applying to wills and codicils, I would say that there was nothing to lead us to suppose that one was a substitution for the other. We find this person was in the habit of writing several wills, and upon the whole case, from the impossibility we are under of ascertaining the final intention of the testator on the internal evidence of the latter, we are entitled to consider the original will as continuing in force, and the legacies as cumulative.

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PENNEFAHER, B.—The Ecclesiastical Court having, by the grant of probate, decided that the two instruments are to be taken together, as constituting the last will of the testator, the duty then devolves upon us of construing the entire as one instrument. It appears that the latter instrument is imperfect—imperfect in what is called in the Ecclesiastical law, will and intention. For a considerable time the Ecclesiastical Court considered such an instrument as altogether void; however, later decisions, which appear consequently to be of better authority, have held that the latter instrument, when rendered imperfect

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by sickness, insanity, or other such cause, is not to be considered void ; but is to be considered, so far as it goes, as part of the prior will ; and we are bound in adopting the opinion of the very learned judge, before whom this case was tried in the Court of Prerogative to give it construction accordingly.

The Lord Chief Baron has gone through the cases on the subject with great ability, and has laid down the law in respect to it. I quite concur with the opinion he has expressed, and it only remains for me to say, that we consider the latter instrument as imperfect in will and intention. It is to be considered that the first instrument is a perfect will in all respects, and I conceive that a second instrument, such as this, in order to have the effect of altering the first will ought to be clear, and the intention to that effect ought to be manifest. Now, can it be said that any such intention here appears ? We cannot say what might have been done by the testator, had he been permitted to go on. It appears that he was in the habit of making, from time to time, different dispositions of his property, and in one of his codicils, he says, “ after paying “ the debts due by me and the aforesaid legacies, with those “ hereinafter to be named and bequeathed in this or any “ other codicil to be annexed to this my will.” Here he manifests an intention of making a further disposition. Now it will be found that the legacies in the latter instrument are given in effect to different persons : they are given in trust to some persons, but beneficially to others. In amount they differ most materially. We cannot find a manifest intention on the face of this instrument to revoke the legacies given by the perfect will. I think we should be groping in the dark if we were to put the case

on any other grounds than this. I believe there ~~is~~ no case of this kind of an imperfect will coming before a Court of Equity for construction ; the wills termed imperfect are so only in respect of certain solemnities. But here we cannot say what have been done afterwards, and therefore we cannot come to the conclusion that the bequests contained in the latter instruments are revocations of those in the former.

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RICHARDS, B.—After the luminous exposition this case has received, I do not consider it necessary to say much ; I concur in the general law which has been laid down on the subject. I think it right, however, to mention that I felt some doubt whether it was competent for this Court to examine into the circumstances by which this gentleman was prevented from finishing the second will, because the Court of Prerogative having granted probate of that document, I entertained considerable doubts whether we could go behind that probate, and examine into such circumstances. But upon the best consideration which I have been able to give the case, I am of opinion that we are at liberty to regard these circumstances, and to examine the doctrine which is the foundation of the sentence of the Court of Prerogative. Now, if it is competent to us in construing those instruments to consider the last instrument as unfinished, I mean in substance and not in form only, and to consider it as unfinished by a certain interruption, I am of opinion, that in construing it as a revocation of any of the bequests in the former perfect will, we ought to have clear evidence of the testator's intention, because we are now quite in the dark as to what would have been the testator's ultimate disposition of his property if his life had been spared. The learned Baron expressed his concurrence with the other members of the court.

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LEFROY, B.—If this were not a case of admitted peculiarity and importance, I should feel myself precluded from doing more than simply expressing my concurrence in the opinions already delivered by the Court; but it is right from its peculiarity and importance, and from the circumstance that our decision may at first sight appear to conflict with other determinations in like cases, that every member of the Court should express the grounds of his opinion in this. The question is on the effect of two instruments, which by the sentence of the Ecclesiastical Court are to be taken as constituting the last will of the testator. A difficulty occurred to me, as to the other members of the Court, from the imperfect nature of the second instrument, and from the Ecclesiastical Court having given probate of it, as if it were of a more perfect character; but upon examination, I am of opinion that the Ecclesiastical Court did quite right, and I think it unnecessary to examine the authorities referred to upon that point by the Lord Chief Baron. We must then take these two documents as constituting the last will of the testator, and we must view the case under a double aspect, considering it both as a whole, and as distinct and separate instruments: in both views of the case we are in my humble judgment, justified in saying that the bequests given by the latter instrument are cumulative, and not substitutional for those given by the first. The general rule is that bequests given by a latter instrument are to be taken as cumulative; for he who gives twice is to be supposed to give two gifts. That general rule is stated in *Hooley v. Hatton* (a) in this manner:—if from the documents there can be collected from internal evidence, from

(a) 1 Bro. C. C. 390.

a comparison of all the documents, that the testator intended to substitute the second for the first, the general rule is superseded. A very important circumstance in the case is the announcement at the outset of what I must, for distinction's sake, call the second instrument, that it is intended by the testator for his *last* will and testament. That has, in other cases, been adverted to as a circumstance upon which great stress has been laid, as showing that the bequests contained in such an instrument should be considered as substitutionary. It was necessary therefore, to examine this point with accuracy and attention. I have accordingly looked into the cases on the subject. I shall not go through those which have been cited by the Lord Chief Baron, but there are some others which it is important to mention. In all the cases in which the second document was held to be substitutional, there were other important and substantial reasons, not occurring in the present case, which controlled the operation of the first. The doctrine of thus controlling the effect of one testamentary instrument by another applies to wills and codicils as well as to two distinct testamentary instruments. In the *Duke of St. Albans v. Beauclerc* (a), Lord Hardwicke decided that the legacies given by the second will were substitutional; but in that case there were fourteen bequests given in the first will, twelve of which were repeated in the second will *totidem verbis*. Is it possible to imagine that the testator meant all those to be cumulative? On the contrary, the minuteness with which they were repeated was sufficient to convince any one that such was not the intention; besides there was a residuary bequest in the second will; and

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(a) 2 Atk. 636.

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therefore if the legacies had in that case been held cumulative, this absurdity would have followed, that there would have been two residuary bequests in an entire disposition of the property. In *Coots v. Boyd* (a) it was held that a codicil was substitutional. But the ground on which Lord *Thurlow* decides that case, is principally from the repetition of the residuary clause. Therefore, we find a circumstance in this case which is conclusive evidence of the proper mode of construction. The Lord Chief Baron has contrasted the legacies given in the two testamentary papers in question, so that I need not do so further; but in all the dispositions both of will and codicil there is not one repeated in the second document in precisely the same manner. All the legacies vary in amount, showing any thing but that verbal repetition to which Lord *Hardwicke* and Lord *Thurlow* allude. In *Jackson v. Jackson* (b) there was a repetition and above all a residuary bequest. In the *Attorney-General v. Hardy*, as in *Jackson v. Jackson*, the second instrument began with words importing it to be intended for the last will of the party; and no doubt it was then held to be a substitution; but was it simply on the ground of the commencement importing to be the testator's last will? The Vice Chancellor says, [Here his Lordship cited the passage already extracted in the judgment of the Lord Chief Baron.] The next case is *Heming v. Clutterbuck* (c), where the second will was held by the Vice Chancellor to be a substitution, and his judgment was concurred in by Lord *Eldon* in the House of Lords, on these grounds: "Looking at the whole of what the testator has done

(a) 2 Bro. C. C. 528.

(b) 2 Cox, 35.

(c) 6 Mad. 321

“with regard to every other legatee named in the first will, and in the second will, this is not a case in which you would be fairly justified in saying there is internal evidence which ought to satisfy you that the testator meant these to be cumulative.” Now here we have, from what the testator has done, internal evidence that he did not mean those legacies to be cumulative. The next case is *Brine v. Ferrier*(a), where the dispositions were utterly irreconcilable: in the first, the testator bequeathed his whole property to his wife for her own use: in the second, he gave the property to the wife upon trust. The second instrument was utterly irreconcilable with the first, and on that principle the second was held to be a substitution for the first.

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These are all cases in which, upon internal evidence, the second was held to be a substitution. In every case there were clear circumstances, over and above the recital, that the second document was intended for a last will. Is there then any case in which the document imported to be a last will, and yet the legacies were held cumulative? Yes, *Ingram v. Strong*; where the second document imported to be “instructions” for a last will. That is a clear authority for holding as we hold here, that that circumstance should be controlled by other circumstances. There is also the case of *Benyon v. Benyon*(b), which appears to me to come precisely up to the present case. The Master of the Rolls says, “As to the other question, the testator sets out by making what is called the first codicil, as if he meant an entire new will; and I should have thought

(a) 7 Sim. 549.

(b) 17 Ves. 43.

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“ it intended as a substitution for the former will, except
 “ from the circumstance that towards the end, he refers
 “ to the former will and recognizes its existence. It must
 “ therefore operate, except so far as it is revoked ; or as
 “ the second contains provisions inconsistent with it. The
 “ question is, whether, as he gives legacies by this second
 “ testamentary paper to most of those persons, who have
 “ legacies by the will, he intended they should take sets
 “ of legacies, or only those given by the second instru-
 “ ment. All except one, are legacies of different sums.”
 In this case, I may say that there is not a single legacy
 in the second will perfectly identical with the first. Here
 then is a plain authority that an instrument importing to
 be a last will was held to be cumulative. These cases
 show that circumstance has been controlled by the
 diversity of disposition. Here is no residuary clause—no
 disposition of the whole property.

Another view of the case is this : we have hitherto been
 considering the instruments as different : but supposing we
 are to consider the instruments as *one*, according to the
 3rd resolution in *Cary v. Pryne(a)*, whatever view we take
 of this case, whether the documents be considered as
 separate, or as one, the authorities appear to warrant us in
 the conclusion to which we have all come, that these
 legacies are cumulative and not substitutionary.

(a) 1 Bro. C. C. 391.

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 EXCHEQUER.
 Monday,
 Feb. 7.

MR. BARLOW, on behalf of the plaintiff in the first cause, moved that the conditional order obtained by him on the 4th December, 1841, to extend the receiver in the second cause to the first cause, might be made absolute, notwithstanding the affidavit of *Elizabeth Meredyth*, a defendant in the first cause, filed as cause against that order. Process of sequestration had issued against this defendant.

The affidavit of a defendant, against whom process of sequestration has issued, will not be heard as a cause against a conditional order obtained in the cause, such affidavit not stating any irregularity in the proceedings.

The affidavit filed as cause does not state any irregularity in the proceedings, and therefore cannot be heard as cause. A party in contempt, as this defendant is, cannot be heard to contradict the statements of a bill, or to allege new facts; ——— *v. Lord Gort(a)*. [**PENNEFATHER, B.**—Is your notice founded on the sequestration?] Yes.

Mr. T. B. C. Smith, Q. C., opposed the motion.

COURT.—If there is a sequestration in the case, we cannot hear a person who is not a party, being in contempt. Make the order absolute.

(a) 1 Hog. 77.

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EQUITY
EXCHEQUER.
Monday
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RAYMOND v. EVANS.

In an undofended case, the proofs shall be entered as read, and the plaintiff shall take such decree as he shall abide by.

THIS cause had been heard on a former day. The defendant had been served with subpoena to hear judgment on the former hearing ; but not having then appeared, the defendant's answer and the plaintiff's proofs were read, and the case stood over for judgment. In pursuance of an intimation then expressed by the Court, that they would revise the practise in undefended cases,

LEFROY, B. now said :—It has occurred to us that it was a very inconvenient practice, that in an undefended cause, the proofs should be gone into by the plaintiff, and that the Court should have the trouble of adjudicating rights between parties in the absence of one of them. I have conferred with the Lord Chancellor, and find that it is the practice as well in England as in his Court, that in such cases the plaintiff shall take such decree as he shall abide by, even on a hearing, where a party in possession of a decree does not appear, which is a very strong case. Baron *Pennefather* concurs with us, that this is a more convenient practice than to hear the cause *ex parte* ; and, accordingly, that in future the party shall take such decree as he will abide by.

PENNEFATHER, B.—What the Court is now doing is what should be done in every case, and is quite consistent with the ancient practice of this Court. On decrees on sequestration, the plaintiff takes such decree as he shall abide by. If issue was joined, and the party did not

appear, the ancient practice was that the Court gave a conditional decree, and that the plaintiff should make absolute such decree at his peril. In 1837 we considered that practice, and ordered that if the party who was served with process did not appear, he should not be entitled to any further indulgence, and that the plaintiff should be entitled to an absolute decree. But we only intended to substitute an absolute decree against the defendant who did not appear at the hearing for the conditional decree, which was formerly made absolute at the plaintiff's peril, so that the absolute decree should also be made at the plaintiff's peril. It was further the practice, when making that conditional decree absolute, to enter the plaintiff's proofs as read. We do not mean to say that was necessary, or that any entry of proofs should be made; but it is not necessary to alter our ancient practice in that respect. I say it is not necessary to enter the proofs as read, for the House of Lords will not receive an appeal from a party who has not appeared at the hearing, and the party intending to prosecute an appeal in such a case must apply to this court for a rehearing; and the Court will, in its discretion, grant such a rehearing on such terms as it may think proper. I think it right this matter should be brought before the Court: it took place on a change of practice so late as five years ago; and it is satisfactory to find that the rule we now are about to adopt is conformable with what is the practice of the Court of Chancery, both here and in England. We have said so much upon it in order that it may now be understood as the practice of the Court.

1842.
 RAYMOND
 v.
 EVANS.

1842.

EQUITY
EXCHEQUER.
Tuesday,
Feb. 8.

In the Matter of INCE and Others, Petitioners.

The Court will not on motion, refuse to allow the usual fees payable on the swearing in of attornies to the secondary, the tipstaff, and deputy crier.

Semble, that these fees are now legally established.

THIS was a petition presented by several gentlemen who had been sworn in attorneys of this Court, praying that certain fees might be refunded to them, which had been exacted from them on their being so sworn in. The fees in question, which were required in respect of each individual sworn, were as follows:

	£	s.	d.
To the House-keeper - - -	0	2	6
To the Officer who swore the gentlemen in, - - -	1	1	0
To the Crier - - -	0	13	6
To the Tipstaff - - -	0	7	6

These fees had been paid Mr. *Nugent*, the secondary, who made an affidavit that he had been in the habit of receiving such for the last thirty years. There was also a sum of 10*s.* 6*d.*, claimed by the house-keeper, for the use of a gown, from each of the gentlemen admitted.

Mr. *Nelson*, Q. C., moved the prayer of the petition, and contended that, under the 4 Geo. IV. c. 70, the officers of this Court were prohibited from demanding any fees, except those specified by that Act, and that no such charges appeared payable thereby, except the fee to the officer for swearing the petitioners in. He would not dispute for the charge of 2*s.* 6*d.* for the house-keeper.

Mr. *George Bennett*, Q. C., for the tipstaff and deputy crier. The tipstaff swears that he was appointed by Lord *Aronmore*, when Chief Baron, in 1801; that similar appli-

cations to the present had been made to Chief Baron ^{1842.}
O'Grady and Chief Baron *Joy*, and that he had been paid ^{In the Matter}
 fees of this amount. The deputy crier swore that his fees ^{of INCX and}
 were fixed at this amount, by Lord Chief Baron *O'Grady*, ^{Others.}
 on a similar occasion. The 10th Report of the Commis-
 sioners of Inquiry shows the legality of these fees, and
 they are recognized in the Act of Parliament founded on it.
 They are also mentioned by Mr. *Stewart*, Practical Forms,
 p. 41. The officers have always been paid their fees to
 this amount for more than thirty years.

PENNEFATHER, B.—I believe they are quite correct in
 stating, that so far back as the matter can be traced, there
 have been such fees as these paid to the officer. There is
 no enactment which applies to those two fees. The
 4 Geo. IV. expressly reserves the right of the crier: the
 legislature, at that time, left undetermined the regulation
 of his office; he had duties at the three sides of the Court,
 the law, the equity, and revenue sides; the legislature
 never regulated the revenue side from that day to this.

We do not see any ground to maintain the claim of the
 court-keeper for the use of a gown. There is no informa-
 tion given us as to that. The fee of £1 1s. to the
 secondary is clearly established by the statute. With
 regard to the fee of £1 1s. to the tipstaff and deputy crier,
 the case stands thus: they have received it as long as can
 be traced; the tipstaff had his fee of 7s. 6d. from the year
 1801, when he was appointed to his office, and he got a
 return, on his appointment, from his predecessor, that it
 was a proper and legal fee; and he swears that since his
 appointment the question has been twice brought before the
 Court, and that it was held a proper and legal fee. The fee of

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of Ince and
Others.

the crier stands much upon the same foundation. He swears that it has been allowed since he was appointed in 1831, and that the question as to his right to it was brought before the Court in the time of Chief Baron Joy. It also appears that in 1815, when the fees of the officers of the Court were brought before the Commissioners of Inquiry, a sum of 14*s.* 7½*d.* was then claimed by the crier as a legal fee, receivable by the deputy crier. It did not appear in the book of charges, published in 1734, but was claimed in 1815, and came then before the Commissioners. It does not appear that any report was made against it by them, on the contrary, it appears that an express provision was made in the Act, that as the office of crier was not confined to the law side of the Court, but as it applied also to the equity and revenue sides of it, it was to be considered as matter for future legislation. It appears to me that the proper construction of that statute is, that these fees should be reserved for future legislation. I think, therefore, that so far as relates to the fees of the crier and tipstaff, we ought not to interfere with them on a summary application. If, however, any person thinks himself aggrieved by the payment of this demand, he may bring an action against the tipstaff or crier for extortion. At present, however, we ought not to interfere with them. As to the claim of 2*s.* 6*d.* to the house-keeper, it stands not upon such strong grounds as the claim of the tipstaff and crier; but it has some foundation—for Mr. *Nugent* swears that he received this fee for the house-keeper along with the fees for the tipstaff and crier, so that it has been allowed for thirty years. We are not called on to pronounce definitively as to the right to this fee; but we may say that the secondary may continue to receive that fee along with the fees for the tipstaff and crier. It appears that this fee

of 10s. 6d. was received partly for the use of a gown, ^{1842.} whether it were furnished or not; so Baron *Richards* ^{In the Matter of INCX and Others.} informs us. There may have been a mistake about this; but we must say, that we do not think the court-keeper has established a right to that fee.

RICHARDS, B.—I do not wish to express any opinion, one way or another, which may be considered to bind me, if this case should ever come before me in another shape; but I think the crier and tipstaff have made a *prima facie* case. I think it right to state, that in the report of the Commissioners a sum of 14s. 7½d., of the then currency, is mentioned to have been claimed, and appears to have been received by the crier in 1815. To the tenth report of the Commissioners of Inquiry a tabular schedule is annexed, which contains three columns, the first of which contains a statement of fees claimed in 1734, the second, a statement of the fees claimed by the chief crier in 1815, and the third, the payments demanded by the deputy crier in 1815. I find that in 1734, no fees were claimed by the crier, and I find that 1815, no fee was claimed by the chief crier for this duty; but that the deputy crier claimed 14s. 7½d. for the same duty. How long the deputy crier enjoyed it before, I do not find, and therefore cannot, from any information given by that report, take upon me to say whether this is a rightful fee or not; but the claim to it having gone before parliament, and it not having been abolished by the act, I think we are to presume that it is. Then with respect to the tipstaff, there is no return of his fees; but he was one of the officers intended to be referred to a subsequent act. It appears, however, from his affidavit that he has received this sum ever since his appointment. With respect to the

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of INCE and
Others.

rights of the house-keeper, as the opposition to her claim has been withdrawn, her case has not been brought before us, therefore I shall say nothing about it. As to the court-keeper, it will be for her to state what her claims are; but I do not at present consider that she has shown a right to them.

LEFROY, B.—An application has been made to the Court to interfere in this case, the petitioners insisting that they are entitled to be repaid the sums paid by them, on their admission, to the tipstaff, deputy crier, house-keeper, and court-keeper. Now, in my judgment, we should be perfectly satisfied that these fees are illegal, before we interfere with what is the right of all officers of the Court, namely, that they should receive a proper remuneration for the performance of their duties. Their only remuneration is derived from these fees. It is a great satisfaction to us to know, that in deciding that the officers are entitled to those fees, we do not interfere with the parties obtaining another adjudication of the matter if they think fit. My judgment is formed upon the same grounds as those of my brethren, that we ought not summarily to interfere with the claims of the officers. One of them we find in possession of these fees for so long a period: the others indeed cannot speak to enjoyment of them for the same length of time; but with respect to the tipstaff, I think it would be improper now to interfere with a man who has been in possession of such a right for upwards of thirty years. The crier cannot speak to so long an enjoyment; but the tipstaff never received his fee as an independent sum, but as part and parcel of one entire fee, the remainder of which went to the crier, and which, therefore, must have been received for the same time.

This fee has grown up since 1834, but it may have ^{1842.} grown up legally since that time; for I take it that the Court will provide a reasonable fee for its officers who ^{In the Matter of INCE and Others.} have no salary. Upon the whole, I clearly concur with the other members of the Court that we ought not now to prohibit those officers from demanding those fees, leaving it to the parties to take what steps they may think fit.

Mr. *Bennett* submitted, that as an officer of the Court had apprised the petitioners of the previous decisions of the Court, the Court ought to give the costs against them.

PENNEFATHER, B.—If you had furnished them with a note of the cases, it would be another thing, but it seems to have been difficult to find them, and they have not been cited even upon argument.

Motion refused, without costs.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN IRELAND,

IN EASTER TERM, IN THE FIFTH YEAR OF QUEEN VICTORIA,
AND THE SITTINGS AFTER.

1842.

LINDSAY v. PARKINSON.

EXCHEQUER
OF PLEAS.
Saturday,
April 16th.

Assumpsit on
a guarantee,
" that in
consideration
that the plain-
tiff would give
credit to *E. P.*
to the amount
of £400, the
defendant un-
dertook to
guarantee,"
&c. Aver-
ment, that the
plaintiff gave
credit to *E. P.*
to the amount
of £300.

Held, on

special demurrer that the giving credit to the full extent of £400, was not to be construed a condition precedent, and that the plaintiff was entitled to recover.

Assumpsit on a guarantee. The declaration contained one special count, and the common money counts. The first count stated, that " in consideration that the said plaintiff, at the request of the said defendant, would give to one *Edward Parkinson* credit to the amount of £400, the said defendant then and there undertook, " and faithfully promised to protect and guarantee him " the said plaintiff from any loss in the said plaintiff's " dealings with him the said *Edward Parkinson* to the

“ amount of £400 aforesaid, and the said plaintiff avers, 1842.
 “ that he, confiding in the said promise and under- LINDSAY
 “ taking of the said defendant, afterwards, to wit, on v.
 “ the day and year, &c. and on divers, &c. did give PARKINSON.
 “ credit to the said *Edward Parkinson* to the amount of
 “ £300, in certain dealings then and there had between
 “ the said plaintiff and the said *Edward Parkinson*, for
 “ a reasonable time; and that, although the said credit
 “ and the time for the payment of the said sum had
 “ elapsed, the said *Edward Parkinson* did not, nor did
 “ any other person pay, &c.”

The defendant pleaded the general issue to the money counts, and demurred specially to the first count, alleging as causes of demurrer, first that it did not appear that the plaintiff gave credit or was willing to give credit to *Edward Parkinson* for the sum of £400. Secondly.—That it did not appear *how* the alleged credit was given.

Monahan, Q. C. and *Ince* for the demurrer.—The condition stated, viz.—that the plaintiff should give credit to *Edward Parkinson* for £400, was a condition precedent. There is nothing to prevent the parties entering into such a contract, though in all the cases the guarantee was that the defendant would undertake if the plaintiff would give credit, without stating in what amount he was to give credit. The construction the plaintiff has given to the contract is to make the giving credit to the amount of £400 a condition precedent, and a condition is as strong as a covenant and should be stated with equal precision. The plaintiff has no right to call upon the defendant to fulfil his part of the contract

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 LINDSAY
 v.
 PARKINSON. until he has fulfilled his own ; if there were a covenant to give £400 it would not be fulfilled by giving £300, and this is a parallel case.

Secondly.—It does not appear how the credit was given, whether by goods sold or otherwise ; the presumption is, that it was given by release of a debt. The rule is laid down in all the text books, that a party cannot plead generally that he performed a covenant or a condition, but must show specially, how he performed it.

Napier and Boyce, contra.—This case is one of a general guarantee ; *Simpson v. Manley(a)*. If the sum is material the guarantee would be discharged, if the plaintiff had given *Edward Parkinson* credit for £401. *Mayer v. Isaac(b)* ; *Kirby v. Duke of Marlborough(c)*.

PENNEFATHER, B.—If the intention of the parties were so novel as is contended for by the defendant, and so contrary to the general course of business, I think with the Court of *Exchequer* in *England*, in the case cited from *Meeson and Welsby*, that such intention ought to have been clearly expressed. We think the plaintiff is entitled to judgment, and that the obvious meaning of the guarantee is, that credit should be given to *Edward Parkinson*, and that defendant would be answerable for any sum within the amount of £400.

LEFROY, B.—The construction contended for by the party taking this demurrer cannot be maintained. There

(a) 2 Cr. & Jer. 12. (b) 6 Mee. & W. 612. (c) 2 M. & S. 18.

is a safe rule for the construction of contracts, namely, that they must receive such a construction as shall be reasonable; now, if it is a condition precedent to the guarantee that the party should get credit for £400, then the party might have taken credit for £399, and refused to take credit for £400 and so the security might be evaded:—one party cannot give credit unless the other party will receive it, and thus the defendant might get rid of his liability altogether, for it would put it in the power of one party entirely to defeat the contract. It is very true that where there is a condition precedent, it should be stated in the pleading to have been performed, but this we do not consider to have been the present case, and I think the demurrer must be overruled.

1842.
LINDSAY
v.
PARKINSON.

Judgment for the plaintiff.

1842.

EXCHEQUER
OF PLEAS.

Sat. April, 16.

A defendant had been arrested on a writ of *ca. sa.* on 2nd Dec. 1841, which had not indorsed thereon the place of abode and addition of the defendant.

The defendant swore that he did not know of the irregularity until 8th March last, when all the Barons were out of town on circuit, and that notice of this application had been given on the return to town of the Chief Baron. *Held*, that this was not such laches as precluded the defendant from applying after a term and vacation, to have the writ set aside and the defendant discharged. Per *Lefroy, B.* In future, notice of irregularity in such cases will be held to attach at the time of arrest.

Administratrix of MARTIN v. GREGG.

KEATINGE, Q.C. applied on behalf of the defendant, that he might be discharged from custody, and that the judgment obtained by the plaintiff in this case might be set aside, as the writ had not the place of abode and addition of the defendant indorsed thereon pursuant to the 43rd general rule(a).

It appeared from the affidavit of the defendant that he had executed in 1835, to one *Martin*, a bond and warrant of attorney for entering judgment thereon in the penal sum of £1000. Judgment was entered accordingly on the 4th February, 1835. *Martin* had died in June, 1841, and administration to him had been granted to the plaintiff; who had revived the judgment in *Michaelmas* Term 1841, and issued a *ca. sa.* thereon, under which the defendant was arrested on the 2nd December, 1841, and had remained in custody until the time of the present application. This application had been made in chamber, and had stood over. The defendant also swore that he was not aware of the informality until the 10th of March last, when all the Barons were absent from *Dublin* upon circuit; that notice of this application had been

(a) Reg. Gen. 43. The attorney for the plaintiff in the cause or his agent, shall indorse upon every writ of *feri facias* or *capias ad satisfaciendum*, the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give.

served as soon as the *Chief Baron* returned to town, on the 30th of March last, who had ordered the case to stand over.

[PENNEFATHER, B.—The meaning of this rule was discussed some time ago in this Court, and it was then contended that the addition of the defendant was only required for the security of the sheriff, but we considered that the defendant himself could take advantage of the omission. We did not decide it, but our view of the subject was much governed by the view taken by the two other Courts of Law]. There is only one case in which an application like the present has been refused, and that was a case of laches, where a party had been in custody for more than a year; *Murphy v. Prendergast*(a). In *Hunter v. Reddy*(b), the party was discharged after eight months; there was also a case in the Common Pleas, in which lying by for a term was held not to disentitle the defendant from making a similar application to the present; *Harrison v. Hanley*(c).

1842.
MARTIN
v.
GREGG.

Fitzgibbon, Q. C. contra.—The arrest took place on the 2nd December last. The defendant might have moved in chamber in *Hilary* Term, but made no motion until 30th March. [PENNEFATHER, B.—The case in the *Common Pleas* admitted of longer delay. One Term and vacation is not too great a length of time]. The rule in *England* is, that a party must move on the first opportunity that occurs after he has had notice of an irregularity. If it happen in vacation it should be made in chamber, if a judge is sitting; if not, it should be made in the next term, and if it happen in term, it should be made in that term. [PENNEFATHER, B.—We cannot follow the *English* decisions as to applying in chamber, for we have not

(a) 3 Ir. Law Rep. 216.

(b) Ib. 137.

(c) Ib. 106.

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MARTIN
v.
GREGG.

the same practice as to a judge constantly sitting in chamber here]. If we had any proof of an application to inspect the writ and it had been refused, the time would have run from that refusal; but the defendant never applied to inspect the writ. Baron *Richards* was in town soon after the 16th March.

PENNEFATHER, B.—We think this application must be granted consistently with the practice of the other Courts. It does not follow that there was any laches, because Baron *Richards* happened to be engaged on circuit; he was possibly not in town, and, at all events he may not have been sitting as a judge. It is not laid down by any of the judges that there is laches because the defendant passes a term. I think the leaning of the *English* cases is, that he is visitable with knowledge of any defect in the writ from the time of the arrest, because he might have called for the writ and seen it; I should be disposed to agree with that rule; but taking that to be the case, there has no such time elapsed in this cause as that the defendant, according to the decisions of the other two Courts here, would be visitable with laches. The rule must be to discharge the defendant out of custody, not to set aside the writ. We will give no costs of this motion.

LEFROY, B.—I think it right to say, lest it should encourage parties to come here, swearing that they had not notice of an irregularity, that the Court is inclined to consider that a party should be held to have had notice of an irregularity of this nature from the time of his arrest.

Let the defendant be discharged out of custody. No costs of this motion.

JOHNSON v. O'HAGAN.

1842.
EXCHEQUER
OF PLEAS.
Mon. April 18,

DEBT on a bond of indemnity, executed by the defendant as a surety for a third person, conditioned for the due performance by the principal of the duties of agent and factor of the plaintiff, and that the principal should account for such sums of money as should come to his hands, and should perform the covenants and conditions in a deed therein recited. Oyer had been prayed of the deed, which was set out on oyer. The defendant pleaded generally the performance of the covenants. It appeared that some of the covenants in question were negative covenants, and the plaintiff demurred specially to the plea, on the ground that the defendant had not specially pleaded performance of the negative covenants. The defendant had on a former day made application for liberty to amend his plea, and plead, specially, the performance of the negative covenants.

Where a defendant was sued on a bond conditioned for the performance, by a third person, of covenants, (some of which were negative) and pleaded generally, performance of the covenants; and the plaintiff demurred to such plea. The Court permitted the defendant to amend his plea and plead specially, performance of the negative covenants.

D. Lynch, now renewed the application for leave to amend.—It is laid down in all the authorities, that when a special demurrer is taken, the opposite party may come in to amend, as a matter of course, while the proceedings are yet in paper. *Graham v. Shaw* (a), does not contradict that rule; the very object of stating the grounds of demurrer is to enable the party to do so. *Hoyte v. Hogan* (a).

Napier, contra.—The question of amendments was much discussed in this Court, in *Sims v. Thomas* (b), and it was

(a) 2 Ir. L. R., 331.

(b) Ante p. 19; 3 Ir. L. R. 415.

1842.
JOHNSON
v.
O'HAGAN. held that amendments are not permitted as *ex debito justitia*,
Graham v. Shaw (a). There is no affidavit of a defence
on the merits.

Lynch.—The very nature of the case shows that the defendant could not have made an affidavit of merits, since the condition was for the performance of the duties of another person as agent to the plaintiffs.

BRADY, C.B.—The Court can see that there is a question to be tried, and we think this is a fair case in which to allow amendment of the plea, on payment of costs, and on the defendant undertaking to amend within a week.

(a) 1 Ir. L. R., 373.

1842.
EXCHEQUER
OF PLEAS.
Fri. April, 22.

LEVY v. FENTON.

Assumpsit against an examiner of the Court of Chancery, who pleaded his privilege as such to be sued in Chancery, and verified his plea by an affidavit that "the within plea is true in substance and in fact, to the best of this deponent's judgment and belief."

ASSUMPSIT on a Bill of Exchange. The defendant was an Examiner of the Court of Chancery, and has pleaded his privilege as to the jurisdiction, and verified the plea by the following affidavit:—

"*Thomas Fenton*, the defendant in this suit, maketh oath and saith, that the within plea is true in substance
"and in fact to the best of this deponent's judgment
"and belief."

Held, 1st, that such plea must be verified by affidavit. 2dly, that this affidavit was not sufficiently precise, as it did not state that the deponent was still exercising or ready to exercise the duties of his office..

T. B. C. Smith, Q. C. with whom was *P. Blake*, for the plaintiff, applied to have the plea set aside; a verifying affidavit is necessary in this case, and this affidavit is informal, being only on the deponent's hearsay and belief. In *Tidd's Forms* 228; *Steward's Forms* 510; and *Chitty on Pleading*, the form given for such an affidavit is that "the plea hereunto annexed is true in substance and matter of fact." *Davidson v. Chilman* (a); *Cunningham v. Johnson* (b); *Pearce v. Davy* (c). There will be a great hardship if this plea is allowed, for the Statute of Limitations will then be a bar at the Petty Bag side of the Court of Chancery to the plaintiff's demand.

1842.
LEVY
v.
FENTON.

Boyle, for the defendant.—This is not a plea to the jurisdiction, but to the person of the defendant, and a verifying affidavit is not necessary. The defendant appeared personally, which in itself was notice of his intention to make this defence. This is a prescriptive right of the officers of the Court of Chancery, *Wilkes v. Williams* (d); and is more favoured than other claims, and need not be so precisely pleaded, because the Court will take notice of it. [PENNEFATHER, B.—You may assume that the officers of the Court of Chancery must be sued there.] Then is it necessary that he should verify this plea by affidavit at all? Before the Statute 6 Anne, c. 10, it was not requisite to do so. Foreign pleas required to be verified by affidavit, but pleas to the jurisdiction did not. *Cholmly v. Broom* (e). There are two alternatives, of one of which the defendant must make use; first, by affidavit; secondly, by some probable matter that the fact of the plea is true. *Pearce v. Davy* (f).

(a) 1 B. N. C. 297. (b) *Sayers*, 19.

(d) 8 T. R. 634. (e) 3 Salk. 173.

(c) 1 Ld. Keny. 364.

(f) 1 Ld. Keny. 364.

1842.

LEVY
v.

FENTON.

[PENNEFATHER, B.—The case of an attorney of another court is quite analogous, and it would require an affidavit. The general rule is, that a plea of a matter of fact is to be verified by affidavit, but if it would be of a matter of record, an affidavit is not necessary. Now an attorney's admission is enrolled as of record on the rolls of the court of which he is an attorney, but that would not be enough, for he might not practice there; therefore, an affidavit is necessary.] There can be no distinction between an attorney of the court, and one of its resident officers, and the court will judicially recognize this defendant to be such. [BRADY C. B.—That must be in the case of an attorney of the same court. *McDougall v. Claridge* quoted by *Tidd*, p. 640, shows that that principle applies only to a case in which the Court can inspect its own record.] Then the affidavit, if necessary at all, need not be so positive as is contended. *Sharpe v. Withane(a)*. [BRADY, C. B.—He does not swear that he is the same person mentioned in the plea. PENNEFATHER, B.—He does not say that he was attending in his office, or was ready to perform the duties of his office.] Then the Court will allow the affidavit to be amended, *Onslow v. Smith(b)*.

BRADY, C. B.—It is plain that this is a plea which must be verified by affidavit; and there are parts of the plea entirely within his own knowledge and which we must expect him to verify positively, not on mere hearsay. *Odell v. Raymond(c)* is a strong case to show what the Court will require in this respect. The motion must be granted; but without costs; none are asked by the notice of motion.

(a) *McClell. & Y.* 350.

(b) 2 B. & P. 384.

(c) F. & S. 214.

FREWEN v. ORR.

1842.

EXCHEQUER
OF PLEAS.

Wed. 12th Jan.

Where the plaintiff was seized in fee of a several fishery in a part of the River B. not navigable, and the defendant constructed certain weirs of timber in a part of the same river below the plaintiff's fishery, and where the tide ebbed and flowed — *Held*, that such weirs were illegal under the 10 Car. I. ses. 3, c. 14, *Irish*, and *Held*, that in an action for an injury to the plaintiff's fishery in which the plaintiff had stated the weirs to be wrongfully and injuriously erected, but had not alleged the erections to be a nuisance, where it appeared from the evidence that the erections were a nuisance in a navigable river, the defendant cannot take advantage of his right respecting them as he might otherwise have done.

TRESPASS on the case for an injury done to the plaintiff's fishery near *Innishannon* in the county of *Cork* by the erection of certain weirs by the defendant in the River *Bandon*. The declaration contained 13 counts.

The first count stated, that “ whereas the said plaintiff
 “ on the 1st day of February, in the year of our Lord
 “ 1839, and before was and from thence hitherto hath been
 “ and still is seized in his demesne as of fee of a sole and
 “ several fishery in the *Bandon* River, to wit, in that
 “ part of the said River *Bandon*, situate in, upon and
 “ along the plowlands of *Droumkeen*, otherwise *Drumkeen*
 “ and *Currineer*, otherwise *Currinure*, and the half
 “ plowlands of *Lafferinfineen*, otherwise *Loughfarmfineen*,
 “ and of and in certain pools or holes of said river
 “ called *Bridgepool*, *Deadhole* and *Carrigeen*, in the county
 “ of *Cork*, to wit, at *Bandon*, in the said county; and
 “ was then and there entitled to the benefit and profit
 “ thereof; into which said fishery of said plaintiff divers
 “ large quantities of fish, to wit, of salmon and trout and
 “ other fish, had from time to time, before the obstruc-
 “ tions hereinafter mentioned, been used and accustomed
 “ to come, and but for the said obstructions would have
 “ continued to come, from the sea, and from that part
 “ of the said River *Bandon* which lies below the said
 “ plaintiff's said fishery, to the great improvement of
 “ the said fishery of the said plaintiff, and to his great
 “ profit and advantage; to wit, at *Bandon*, in the county

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“ of *Cork* aforesaid. Yet the said defendant, well
“ knowing the premises, but contriving and wrongfully
“ and maliciously intending to injure the said plaintiff,
“ and to deprive him of the profit and advantage of his
“ said fishery, afterwards, to wit, on the 1st day of
“ March in the year aforesaid, and whilst the said plain-
“ tiff was so seized as aforesaid, at *Kilmacsimon*, in the
“ said county of *Cork*, and below the said fishery of the said
“ plaintiff, wrongfully and injuriously fixed and put
“ down in the soil and bed of the *Bandon* River there
“ situate, divers, to wit, 500 stakes and poles, and then
“ and there attached thereto and interlaced therewith
“ divers, to wit, 10,000 rods of wood, 10,000 pieces
“ of timber and 10,000 laths; and then and there
“ wrongfully and injuriously erected and caused to be
“ erected therewith divers, to wit, two weirs and 50
“ traps for catching salmon and other fish in the said
“ River *Bandon*, below the said fishery of the said
“ plaintiff, and continued the same for a great length
“ of time, to wit, from the said 1st day of March,
“ aforesaid, until the exhibiting of the said plaintiff's
“ bill; to wit, at *Bandon*, in the said county of *Cork*,
“ aforesaid; by means whereof divers large quantities of
“ salmon, trout and other fish, which otherwise would,
“ during the time aforesaid, have come from the sea,
“ and that other part of the said river which lies below
“ the said fishery of the said plaintiff, were during all
“ the said time obstructed, prevented and hindered,
“ from coming from the sea and that part of said river
“ which lies between the sea and said fishery of said
“ plaintiff, unto the said fishery of the said plaintiff;
“ and by reason whereof the said fishery of the said
“ plaintiff in the said River *Bandon*, which lies in, upon

“ and along the said plowlands of *Droumkeen*, otherwise
 “ *Drumkeen* and *Currineer*, otherwise *Currinure*, and in
 “ the said half plowlands of *Lafferinfineen*, otherwise
 “ *Loughfarmfineen*, and of and in said pools, called *Bridge-*
 “ *pool*, *Deadhole* and *Carrigeen*, in the county of *Cork*, hath
 “ been and still is greatly prejudiced, damaged and lessened
 “ in value ; and the said plaintiff hath, during all the
 “ time aforesaid lost and been deprived of great benefit,
 “ profits and advantages, which he otherwise would have
 “ gotten by his said fishery in the said River *Bandon*,
 “ to wit, at *Bandon* aforesaid, in the county of *Cork*
 “ aforesaid.”

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- The second count was that the plaintiff “ being so seized
 “ of the fee and inheritance of the said fishery as afore-
 “ said, the defendant well knowing the premises, but
 “ wrongfully and unjustly intending to injure the said
 “ plaintiff and to deprive him of the profit and advantage
 “ of his said fishery, afterwards and whilst the defendant
 “ was so seized as aforesaid, to wit, on the 1st day of
 “ March, in the year 1839, and from thence continually
 “ until the exhibiting of the said bill of the said plain-
 “ tiff, wrongfully and injuriously kept, maintained and
 “ continued divers, to wit, two weirs and fifty traps
 “ made of stakes, poles, rods of wood and laths, which
 “ before then had been wrongfully and injuriously made,
 “ put and constructed, at *Kilmacsimon* aforesaid, in the
 “ said River *Bandon*, there situate, and below the plain-
 “ tiff’s said fishery, to wit, at *Bandon* aforesaid ;” and
 averred (as in the first count) that the fish were thereby
 prevented and obstructed from coming into the plaintiff’s
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The third count alleged that “ the plaintiff being so
“ seized as aforesaid of the fee and inheritance of the
“ fishery, the defendant wrongfully and injuriously
“ placed, erected and constituted in the said *Bandon*
“ River, there situate, divers, to wit, two weirs of very
“ mischievous and destructive form and character, for
“ catching salmon and other fish in the said River
“ *Bandon*, below the said fishery of the said plaintiff,
“ and continued the same for a great length of time,
“ to wit, from the 1st day of March, &c. and averred
“ that by means thereof divers large quantities of salmon,
“ trout and other fish which otherwise would, during
“ the time aforesaid, have come from the sea and that
“ other part of the said river which lies below the
“ said fishery of the said plaintiff into the said plaintiff’s
“ fishery, and would and might be caught in his said
“ fishery by the plaintiff and his servants, for his use,
“ benefit and advantage, were during all the said time
“ obstructed, prevented and hindered,” (as averred in the
first and second counts,) from coming into the plaintiff’s
fishery.

The fourth count began in the same form as the third
alleging the plaintiff’s seizin in fee of the fishery, and
alleged that “ the defendant had placed, erected and
“ constructed divers, to wit, two weirs of a peculiar
“ destructive form and construction for catching salmon,
“ and such as had not previously been placed or used
“ for such purpose in or near the said place where the
“ said two weirs were so placed, erected and constructed
“ by the defendant for the purpose aforesaid; and con-
“ tinued the same for a great length of time, to wit,

“ from, &c. ;” and averred (as in the third count,) “ that
 “ by means thereof the fish were obstructed from coming
 “ into fishery of the plaintiff by reason whereof,” &c.

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The fifth count set out the situation of the fishery in a certain part of the River *Bandon*, situate in the lands of *Drumkeen*, &c. (as in the first count,) and alleged the plaintiff's seizin as aforesaid of the fishery, and that the defendant hath set and placed in the said *Bandon* River, then and there ebbing and flowing, divers, to wit, ten stop-nets, ten still-nets and ten standing-nets, for catching salmon and other fish in the said River *Bandon*, below the said fishery of the said plaintiff, and averred (as in the first count), that by means thereof the fish were obstructed and hindered from coming into the plaintiff's fishery.

The sixth count stated the plaintiff to be possessed of the fishery, describing the lands as in the first count, and was for wrongfully and injuriously fixing and putting down into the soil and bed of the *Bandon* River, there situate divers, to wit, 500 stakes and 500 poles, and then and there attaching to, and interlacing therewith divers, to wit, 10,000 rods of wood, 10,000 pieces of timber and 10,000 laths, and then and there wrongfully and injuriously erecting and causing to be erected therewith divers, to wit, two weirs and fifty traps for catching salmon and other fish in the said River *Bandon* below the said fishery of the said plaintiff, and continuing the same for a great length of time by means whereof the fish were obstructed from coming in to the fishery of the plaintiff, whereby the fishery was damaged, but it did not aver as in the first count, the plaintiff's seizin of lands in and upon which the fishery lay, or of the pools.

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The seventh count alleged the possession of the plaintiff without setting out the lands, and that the defendant kept, continued and maintained divers, to wit, two weirs and 50 traps made of stakes, poles, rods of wood and laths, which before then had been wrongfully and injuriously made, put and constituted at *Kilmacsimon*, &c. whereby (as in the last count,) the fish were obstructed and the plaintiff's fishery damaged.

The eighth count alleged the possession of the plaintiff, and the making of two weirs of a very mischievous character by the defendant for catching salmon and other fish; and the obstruction of the fish from going to the plaintiff's fishery.

The ninth count stated the weirs to be for catching salmon only.

The tenth count also alleged the plaintiff's possession, and the erection by the defendant of stop-nets, still-nets and standing-nets in the river.

The eleventh count was in like form, but stated the injury to be the fixing and putting down into the soil and bed of the River *Bandon*, divers stakes and poles, and attaching thereto divers pieces and rods of wood, and placing and extending certain nets upon and along the said stakes and poles, and erecting certain Scotch weirs in the river below the plaintiff's fishery.

The twelfth count stated the plaintiff's seizin in fee of the lands, (describing them) and of the fishery belonging and appertaining thereto, and the fixing into

the bed of the river stakes and poles, and attaching thereto and interlacing therewith rods of wood, pieces of timber and laths, and erecting and causing to be erected therewith two weirs for catching salmon, such as had not ever previously been used or placed for such purposes in or near the place, and alleged the obstruction of the fish thereby.

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The thirteenth count was similar to the twelfth, but stated only the *possession* of the lands and of the fishery appertaining by the plaintiff.

The defendant pleaded the general issue.

At the trial before Mr. Sergeant *Greene*, at the summer assizes for the county of *Cork*, 1841, the plaintiff, to prove his title, gave in evidence a patent bearing date 27th Charles II. which granted to *Thomas Adderley* and his heirs “ the “ three plowlands and a half of *Drumkeen, Currineer, Classafree* and *Ballylangley*, all lying and being in “ the cantred of *Kilbrittain* and county of *Cork*, and “ also all that the half plowland of *Lafferinsneen* “ situate in the barony of *Kinalea*, and said county “ of *Cork*, with the reversion, &c. and all *waters, watercourses, fishings, weirs, quarries* and duties, profits, “ commodities, rights, privileges, jurisdictions and advantages to the aforesaid premises or any part thereof “ belonging.” He also deduced his title from *Thomas Adderley*, and proved his seizin in fee of the lands (which were situated on the River *Bandon*) and of the fisheries. The plaintiff then produced a Mr. *Thomas Hale Adderley*, who proved that *Edward Hale Adderley*, under whom the plaintiff derived, was heir at law of *Thomas Adderley* the patentee, and proved that *Edward Hale Adderley* had

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fished the *Bandon* River with a net from near *Bandon* to a little below *Innishannon*, as far as the bounds of his estate, which lay on both sides of the river. It appeared that the River *Bandon* had its source above the plaintiff's lands, and that after passing through them and by the defendant's weirs, it fell into the sea at *Kinsale*. It was also proved that the tide flowed up as far as *Collier's Quay*, which was above the defendant's weirs and below the plaintiff's fishery. It was also proved that the defendant's weirs were between high and low water mark, part in the slob and part in the river, and that they were covered at high water. The weirs were described by a witness for the plaintiff as follows:—

“ I have seen *Orr's* weirs; there are upright stakes
 “ driven into the slob and horizontal laths about an
 “ inch asunder; the weeds and dirt have choked them
 “ so that even a moderate sized trout could not escape
 “ from any of them; a trout of half-a-pound weight
 “ could not pass: the posts are nearly perpendicular
 “ with the river. There is another wing running into
 “ the channel and an open space to admit salmon which
 “ are guided into a centre purse and cannot get out. I
 “ know Scotch weirs. Defendant's weirs are well cal-
 “ culated for taking salmon; not more so than Scotch
 “ weirs, but they would take smaller fish. The construc-
 “ tion and effect are pretty much alike, they will take
 “ fish at all times. Plaintiff's fishery has been much
 “ injured by these weirs; there is no netting on the
 “ defendant's weirs; they project into the channel of
 “ the river; one projects fifteen feet, the other ten feet.”

The defendant admitted that he had erected the weirs in question.

The defendant then went into his case, and proved a lease of the 23rd of January, 1830, whereby *Francis Earl of Bandon* demised to the defendant's father, all that part of the lands of *Kilmacsimon* called the *Wood of Kilmacsimon*, and the slob thereunto belonging, reserving royalties, (save and except fisheries, bog, timber and other trees, woods and underwoods,) *habendum* to the lessee, his heirs and assigns (provided such assigns should be approved by the said *Earl of Bandon*, his heirs and assigns as thereafter mentioned,) for three lives: and he proved an assignment of the same lease to the defendant, dated 25th January, 1838, and that the defendant had used the fishery in the weirs in question. One of the defendant's witnesses, on cross-examination, said, that he had once seen a boat stuck on one of the weirs, and that a boat could not pass over it.

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The learned Judge charged the jury, and told them that the weirs were not illegal or improper, and that even though the plaintiff were owner of the several fishery, yet, that the defendant's fishing by means of weirs not illegal or improper, would not give any cause of action to the plaintiff, if the defendant had any right of fishing at the place in which the weirs were erected; and he directed the jury to find for the defendant:—the plaintiff's counsel excepted; and requested his lordship to inform the jury—

First.—That the weirs were of such a construction as to render the same illegal; the said weirs being contrary either to the words, or at all events to the policy of the Statute 10, Charles I. sess. 3, chap. 14.

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Secondly.—That fishing by weirs of the construction aforesaid, even if the same were not actually illegal, was an improper mode of exercising such a right, if any, as the defendant had to fish in the place in which, and so forth.

Thirdly.—The plaintiff's counsel required the judge to inform the jury that if they believed the river was navigable at the *locus in quo*, and that the weirs in question obstructed the navigation of the river, the said weirs were illegal, and that if so, fishing with them was illegal, and they ought to find for the plaintiff.

Fourthly.—That if they believed that the weirs in question obstructed and prevented from going into the plaintiff's fishery a greater number of fish than could have been taken by the defendant at the *locus in quo* by any lawful mode of fishing used thereat, they should find for the plaintiff; but the Judge refused to do so, and informed the jury that the injury to the plaintiff's fishery by reason of said weirs did not give the plaintiff any cause of action against the defendant, unless the said weirs were illegal or improper in their construction, which in his opinion, they were not.

Fifthly.—The counsel for the plaintiff required the Judge to inform the jury that inasmuch as there was no evidence that the defendant was possessed of or entitled to any several fishery at the place in which the said weirs were erected, they should, if they were of opinion that the plaintiff's fishery had been injured by the erection of said weirs, find for the plaintiff; but the Judge was of opinion that he ought not to do

so. The jury found a verdict for the defendant, and the plaintiff's counsel tendered a bill of exceptions.

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E. L. Corbet, in support of the exceptions.

Wednesday,
12 Jan. 1842.

The first exception raises the question of the illegality of those weirs by the Statute 10 Car. 1 sess. 3, c. 14, which prohibits the erection of "stop-nets, still-nets, " or standing-nets in navigable rivers"(a). In the *Duke*

(a) 10 Car. I. Ir. c. 14. An Act against the killing of young spawn and fry of eels and salmon.

" Forasmuch as great hurt and daily inconveniencies have and do
" ensue unto all the King's subjects of this realme by the greedy
" appetites and insatiable desire which sundry of them occupying fish-
" ing have used by taking and killing the younge spawn, fry, or breed
" of eels and salmon, as well in salt rivers as in fresh rivers, loughes,
" plashes, fennes, and marshes in many parts of this realme ; as also
" setting up of stop-nets, still nets or standing-nets, fixed upon posts,
" or otherwise, in the rivers where the salmon should passe up from
" the sea, to the great hindrance and prejudice of the commonwealth
" of the realme ; be it therefore enacted by this present Parliament,
" and by the authority of the same, that no manner of person or
" persons, of what estate, degree or condition soever they be, shall
" willingly presume to take any fry, spawn, or breed of eels, in
" any river or water, salt or fresh, within this realme of Ireland ; and
" over this, that no manner of person or persons shall presume willingly
" to take or destroy, in or by means of any weele, net, net of haire, or
" by any other engine, (angling only excepted,) flud-gate, salmon-pipe,
" or at the tail of any mill or weir, or in any straits, rivers or brooks,
" salt or fresh whithin this realme of Ireland, the young fry, spawn
" or breed of any kind of salmon called lakes, pinkes, smowtes, or
" salmon peules ; and also that no manner of person or persons shall
" use, or set, or take any salmon with any such stop-nets, still-nets or
" standing-nets, and if any person or persons offend in any of the
" points before rehearsed, contrary to the tenor, form and purport of
" any part of the same, then every such person or persons so offending
" shall lose and forfeit for every time of his or their such offence the
" sum of 40s, and the fish, and also the unlawful nets and other
" unlawful engines and devises whatsoever they be, made, kept or
" used for the killing, taking or destroying of the young breed, spawn
" or fry of eels or salmon before rehearsed, or setting out of the said
" stop-nets, or taking the salmon therewith, the one half of the said
" forfeiture shall be to the King's Highnesse, his heirs and successors,
" and the other halfe shall be to him that will sue for the same."

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of *Devonshire v. Smith*(a), the question was raised whether Scotch weirs were illegal under that Statute, and the defendant contended that they could only be so if destructive to the spawn; but Baron *Foster* who tried the case thought otherwise, and the case having come before the *Queen's Bench* on a bill of exceptions, that Court decided with the learned Baron. In another case, *M'Adam v. Halliday*, reported in the notes to the *Duke of Devonshire v. Smith*, Baron *George*, before whom it was tried in 1816, came to the same conclusion as Baron *Foster*; a bill of exceptions was taken in that case, but was afterwards given up. The evidence of the construction of the Scotch weirs in the *Duke of Devonshire v. Smith*, applies exactly to the evidence of the construction of the weirs in the present case; so that the Statute must be held to prohibit "stop-nets, still-nets and standing-nets," irrespectively of their effect upon the fry, and these nets are of the same construction as the prohibited engines. [BRADY, C. B. Did any of your witnesses call these weirs network?] The witnesses have described the weirs as constructed of upright posts fixed in the ground, and horizontal laths crossing them. Now "network" or "net" does not necessarily imply a hempen net; "net" is applied by Dr. Johnson in his Dictionary to wood, brass, stone, or any thing with "interstitial vacuities." The same writer terms a "weir" a "network of twigs." So in the Book of Exodus, 27, chap. verse, 4, it is applied to brass; also in 1st Kings, chap. 7, verse 17, it is applied to the chapters of the pillars of Solomon's

(a) Alc. & Nap. 444.

Temple: the translation of the Bible, which was made in the time of James I. is a strong authority as to the exposition of the word *net* at the time when the Statute of Charles I. was passed, which could not have varied much from the meaning attached to that word a short time before, when the Bible was translated. In all European languages the words analogous to *net* are applied to all materials; the word itself is from the German, and in that language means a snare or trap. These engines then have all the characteristics of “stop-nets, still-nets and standing-nets;” there is no conflicting evidence as to the construction of them, the only question is whether they are legal or illegal. But even if these weirs be not within the strict words of the Statute, they are illegal within the intention of the legislature at that time. When a modern Act of Parliament has used words of a plain and definite import, it is very dangerous to put upon them a construction, the effect of which will be to hold that the legislature did not mean what they have expressed;—per *Bayley, J. Rex v. Stoke Damerel*(a). But modern rules of construction apply only to modern Statutes, and do not prejudice the ancient rules applicable to ancient Acts. So per *Coleridge, J. in Rex v. Poor Law Commissioners*(b). The utility of contemporaneous exposition is remarked by Baron *Pennefather* in *Farran v. Ottiwell*(c), and he there uses the language of Sir *Edward Coke*(d). The rules of construction relating to Statutes are collected in 7 *Bacon’s Abridgment*, 450 to 468. Now these are similar in construc-

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(a) 7 B. & C. 568.
(c) 2 Inst. 161, 181.

(b) 1 Nev. & P. 375.
(d) 2 Jebb & S. 148.

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tion to the prohibited weirs, and are erected for the same purpose, and if the Court be satisfied that this was an attempt to elude the Statute they will give it such a construction as to redress the mischief. 7 *Bac. Ab.* 462. The preamble of this Statute shows it was enacted *pro bono publico*, and such an Act should be liberally construed. The *Soldier's Case*(a); *Dean and Chapter of York v. Middleburg*(b). So the Statute of voluntary conveyances has been held to extend to purchasers with notice; *Sugden's Vendors and Purchasers*. The same principle is found in *Jones v. Smart*(c). This mischief is comprehended in the terms of Magna Charta, sect. 23 and 2 Hen. VI. c. 15, and 12 Ed. IV c. 7; and these statutes are extended to *Ireland* by Poynings Law. [BRADY, C. B.—If you only relied upon one Statute before the judge below, it would be irregular to rely upon another now; but this point may possibly be open to you on the general law of the case.]

As to the second exception, we contend that even if the defendant had any right of fishing at the place in question this was an improper mode of exercising that right. Magna Charta, sect. 23, commands that “*omnes Cadelli deponantur*,” “*Cadelli*” means weirs; *Blount's Dictionary*; *Spelman's Glossary*. It cannot be contended that this Statute is repealed or obsolete; for a Statute cannot be repealed but by a subsequent affirmative Statute. [BRADY, C. B.—You may assume that Magna Charta is in full force. It has been acted upon for centuries in England, and very strong measures have been taken upon it.]

(a) Cro. Car. 71.

(b) 2 Young & Jer. 215.

(c) 1 T. R. 44.

Then all these engines are prohibited by it and by the subsequent Statutes of Henry VI. and Edward IV. *Robson v. Robinson*(a) is a very important case upon the Statute of Henry VI. [BRADY, C. B.—You must argue this exception as if it were the only one, and show that this mode of fishing is an improper mode of exercising an admitted right. The word “improper” must mean improper as between plaintiff and defendant.] The mode is improper, because illegal; but if I cannot rely on that argument upon this exception, what is said of its illegality will apply to the fourth exception.

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As to the third exception, viz.—that the weirs are illegal, as obstructing the navigation of a public navigable river it is clearly ascertained that if there is a flux and reflux of the tide in a river, or if boats pass to and fro upon a river, it is a navigable river. *Shultz Aquatic Rights*, 131, Lord *Fitzwalter's case*(b). Hale de j. m. 8. The right of the public to navigate a river is superior even to that of the Crown to erect a weir upon it. *Williams v. Wilcox*(c). A right even of several fishery must be so exercised as not to impede the passage of boats, and even had the defendant a several fishery here, he cannot use it so as to impede the public. As this is a public navigable river the laws relating to highways apply to it. *The Repair of Bridges*(d); *Williams v. Wilcox*. To lay logs of wood in a highway so as to render it less commodious is a nuisance. Hawk. P. C. 696, 701, 696, *in notis*: and so it is to lay wood in a public navigable river; it is no excuse to say that there was room elsewhere. *Rex v. Smith*(e). Com. Dig. “Highway.” E.

(a) 3 Dougl. 308.

(b) 3 Mod. 106.

(c) 3 Nev. & P. 606.

(d) 13 Co. 33.

(e) 3 Keb. 759.

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4; 2 Roll. Ab. 137; *Rex v. Lord Grosvenor*(a); *Anon*(b).
And if an individual having a right in a public navigable river abuses that right he will be liable to an action. *M'Adam v. Halliday*(c); *Weld v. Hornby*(d); *Rex v. Russel*(e); *Ball v. Herbert*(f); *Wilks v. Hungerford Market Company*(g).

As to the fourth exception:—we were entitled to a direction in our favour in case the jury should believe that the defendant's weirs obstructed the plaintiff's fishery; Lord Clare's judgment in *Hamilton v. Marquis of Donegal*(h). In *Keble v. Hicheringill*(i) it was held that a case lies for discharging guns near a decoy, with a design to drive away the fowl which used to resort thither, by which the fowl were driven away and the owner damnified. So too in *Carrington v. Taylor*(j).

As to the fifth exception,—the plaintiff having a several fishery, had a property in the fish before they were caught, although it is otherwise in a public fishery. *Weld v. Hornby*(k); *Robson v. Robinson*(l). This exception has been already argued in the arguments on the other branches of the case.

Henn, Q. C. and *R. J. Lane*, for the defendant.

The question is whether the weirs are *nets* in themselves.

(a) 2 Stark, Rep. 11.
(c) Alc. & Nap. 44.
(e) 6 B. & C. 566.
(g) 2 Bing. N. S. 281.
(i) 11 Mod. 75.
(k) 7 East, 195.

(b) 1 Camp 517, note.
(d) 7 East, 197.
(f) 3 T. R. 253.
(h) 3 Ridg. P. C. 267.
(j) 11 East, 571.
(l) 3 Doug. 308.

If the word "nets" were used separately in the Statute these would not be such; but the Statute was made to apply to a particular injury, and hence the difficulty arises. Now these engines cannot be called nets with propriety: the Statute of Charles I. is a penal Statute, and as such must be construed strictly;—and it appears that these are not nets fixed upon posts, but come within the description of "timber tide weirs" in the *Duke of Devonshire v. Smith*. This is a weir within the meaning of the Acts of Parliament, both on account of the mode of construction and the material. Besides, the exceptions do not refer to stop-nets, still-nets or standing-nets but to weirs. [BRADY, C. B.—The exceptions treat them as nets within the Act.] If they are weirs there is no enactment which makes them illegal; for the nets contemplated by the Statute of Charles I. are nets of hempen. It appears that in the Statutes 17 & 18 Geo. III. c. 19, s. 5, and 26 Geo. III. c. 50, s. 25, and 9 Geo. IV. the word net is used as signifying a hempen net, and as in construing Statutes *in pari materâ* the same words must be taken in the same sense, the legislature must be understood to have meant hempen nets throughout all these enactments. The cases of the *Duke of Devon v. Smith* and *M'Adam v. Halliday*, do not apply here, for in the one the engines used for catching fish were timber-tide weirs, and in the other actual stop-nets, still-nets, &c. But it is said the case is within the policy of the Act, because the defendant's weirs produce the same effect as the nets mentioned in the Statute; but what engine, even a rod and line, would not be within the Statute in that respect? Acts of Parliament should now be construed strictly; *Rex v.*

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Stoke Damerel(a); and in the case of penal Statutes, the Court cannot go beyond the very words of the Act, which must be taken in their ordinary sense. *Dwarris on Statutes*, 702; *Fletcher v. Lord Sondes*(b). And except the inferential dictum in *Rex v. Stoke Damerel* there is no ground for saying that a different rule of construction is to be adopted with respect to ancient and modern Statutes. In the *Duke of Devonshire v. Smith* the damage to the plaintiff was admitted for the express purpose of raising the question. Now here the question raised on the third exception is with regard to a public navigable river, not with regard to the plaintiff's fishery: the plaintiff should have shown a special private damage to himself. [LEFROY, B.—The action is not brought because the river was a navigable river; it is brought because of the injury stated.] Where an injury is done by a defendant to a public way, and injury thence results to the plaintiff, the plaintiff is bound to describe it as a public river, and it is contended that it is described as a public navigable river, because they have described it as a river wherein the tide ebbs and flows. [LEFROY, B.—It was not necessary to say these things were erected in a navigable river, or in a river in which the tide ebbs and flows. The gravamen of the action is the injury to the plaintiff's fishery. The words "ebbing and "flowing" are mere surplusage.] But it ought to be stated whether the party is proceeding for an injury to a public or to a private right. *Non constat* though the injury complained of may obstruct the navigation, that it will also be an injury to the plaintiff's fishery,

(a) 7 B. & C. 568.

(b) 3 Bing. 580.

and there is no evidence in this case of an injury which would enable the party to sustain an action for an injury to a public right. It may be illegal to obstruct the navigation, yet there may be a right in the defendant to obstruct the plaintiff's fishery. The exception put upon the record was in *substance* that if the weirs obstructed the navigation they were illegal; and the question was put on grounds quite independent of the question of damage. [PENNEFATHER, B.—The damage complained of was the loss of the fish; they say that loss was a damage because the act from which it resulted was illegal.]

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Collins, Q. C. in reply.—These are certainly nets; as laths are merely substituted for cords. The material is quite unimportant, and from the construction of the engines they are certainly within the definition of stop-nets, still-nets and standing-nets; *Attorney-General v. Tindal*(a), Hob. 97. Plowden, 467, and are within both the words as well as the reason of the Act. Weirs in navigable rivers are nuisances at common Law; *Williams v. Wilcox*(b), and this comes within that case.

BRADY, C. B.—We are all of opinion that in this case the Court must award a *venire de novo*. There have been five exceptions taken to the Judge's charge, the first and third of which have been principally relied upon in argument, and it is the opinion of the Court that the first and third exceptions must be allowed. The first exception proceeded on the supposition that this erection for the purpose of taking fish, is in truth, of

(a) Prec. Chan. 215.

(b) 3 Nev. & P. 606.

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that sort prohibited by the Statute 10 Charles I. c. 14. It has been relied upon, on the other side, that that Statute uses words which have no reference to the matter in question, and it is urged that these words cannot refer to a thing which is not in the strict meaning of the word, a *net*. It must be conceded that the material of which the engine may be composed will not govern the case, and that the Act does not prescribe that the sort of net it prohibits shall be of hair, or hemp, or any flexible material; for wood, or at all events fibres of wood may be constructed into a similar device. But it is urged that this instrument is not a separate engine, extended upon posts, but is composed of laths fixed upon posts. Now I think it would be putting an idle construction on this Statute to hold that it is restricted to nets of any particular construction, for if so it would be easy the day after it had passed, to nullify all its operation; and looking to its preamble and the evils it was intended to remedy, we may hold that it extended to any engine of this kind, and that the question ought not be tried by the particular mode in which the laths may be arranged, but by the mischief which the engine may occasion. I am then of opinion, and so are my brethren, that this is an erection operating as any stop-net or still-net would operate, and may fairly be described as a stop-net within the meaning of the Act, and therefore, that the first exception ought to be allowed.

The third exception takes a wider range, and though as one exception is allowed it is not necessary to enter particularly upon the rest, yet from the importance of the case, I think it right to explain my reasons for allowing this also. The objection made to the third exception

is founded on the structure of the record ; and it is said that the declaration does not complain of an obstruction to a navigable river, and relies only on the mischief resulting to the plaintiff as an individual, by preventing the approach of fish ; and the case has been compared to that of a highway across which an individual should lead a stream of water to his mill. Now in an action for an injury done to a highway the party is bound to show how he has a right to the *locus in quo*. In this case the plaintiff was owner of a fishery to which the fish came through this river, and whether public or private, he has a right to have the fish allowed to come to him, and is not bound to put upon the record any more special cause of action than the general one, that the fish were prevented from so coming.

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But it is contended that even though there were an obstruction to the navigation, an owner of a fishery cannot found his action for an injury to the fishery upon such obstruction. To be sure he cannot, but if he can show that the obstruction to navigation is a public nuisance, he prevents the defendant from relying upon that as a defence. I am, therefore, of opinion upon the third exception also that a *venire de novo* should be awarded.

PENNEFATHER, B.—I also think that there must in this case be a *venire de novo*. The plaintiff complains of an injury done to his fishery. I assume that such injury has been done to a certain extent. The defendant then justifies, that he had a right to commit this injury because he had a fishery in the place where the obstruction is said to have taken place. The plaintiff says,

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even if you have a right to take fish, you have no right to justify an injury to me by an act which is illegal, either as against a Statute or as against the common Law. The acts of illegality which are relied on by the plaintiff (because it is not controverted in argument that if the case were brought fairly before the Court, there would be no defence for the defendant,) are, that these erections, which are called in one of the counts stop-nets, still-nets and standing-nets, are against the provisions of law; now it appears to me that these erections are against the Statute 10 Charles I. We must not separate the word "net" as distinguished from its adjunct, "still" or "stop;" and taking it in that view, it appears to me that any thing allowing the water to pass through, and fixed in the soil, is a "still-net" within the meaning of the Act. It is not denied that it is within the spirit of the Statute; but it is said that it is not within the letter of it. Now I think it is within the letter of it. There is nothing in the Statute which confines the word to any material or to any mode of construction, whether the laths be horizontal, diagonal, or perpendicular, or to any thing whether attached to posts or not. Therefore it appears to me that those erections are within the words of the Statute.

Now, as to the other point, suppose this not to be a still-net within the words of the Act, it is said that the Judge should have told the jury that these engines were illegal as obstructions to a public navigable river. I think if they obstructed the navigation they were illegal, and that the defendant could not rely on this ground of defence. Then it is said that supposing that were the meaning of the words, the plaintiff has not entitled

himself by his pleading to make this defence. He does not declare upon an injury done to himself in the *locus in quo*, but he says, I have sustained an injury which the defendant cannot justify by showing that he has committed in the *locus in quo* a common nuisance. Thus I consider it; and I do not think this decision conflicts with any of the authorities. Being of opinion with the plaintiff on these exceptions, I need deliver no opinion on the rest.

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RICHARDS, B.—I agree with the opinion already expressed by the other members of the Court; I think the words “stop-nets, still-nets and standing-nets” mean such a stationary erection in a river, no matter of what material it may be composed, as has the effect of stopping the passage of the fish up and down the river. I think it very unimportant to inquire of what material the erection is composed, especially as it must be known that various materials are used in fishing which, in the common acceptance of the words are not nets, I cannot see why the fibres of a tree cannot be made use of as hemp, nor why an engine will not be a net though the material of which it is composed be wood. I do not think it necessary to say anything on the other part of the case.

LEFROY, B.—I agree with the opinion delivered by the Lord Chief Baron. The question, on the first exception is, what the legislature has meant by the words stop-nets, still-nets or standing-nets. The intention of the legislature is to be collected most properly and safely by the objects which the legislature had in view in passing the Act. The great object was to secure a supply

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of fish from the ocean to the higher parts of the rivers; the provisions of the Act go to protect the spawn of fish and the transit of fish; not to legislate upon the subject of nets. That is at once an answer to all those cases which have been cited on the subject of nets; the object of this Statute was (as my brother *Richards* said) to prevent a permanent obstruction to the fish passing up the river. Now the words "stop-nets, still-nets and standing-nets," are inconsistent with the very notion of nets; therefore, we are not to separate the words, but we must take it that an obstruction in the nature of nets is the thing prohibited. These are such an obstruction, and from the evidence it appears that they were the most injurious obstructions to the fishery that can be conceived. I think, therefore, this is a case both within the spirit and the meaning of the Act of Parliament. And as I have made some observations in the course of the argument on the third exception, I shall explain the reasons of the opinion I have formed upon it. Mr. *Henn* said, that it was not open to the plaintiff to rely on the third exception as he had not in his pleading alleged this erection to be a nuisance. But on looking at two of the counts, I find it is said that the defendant "wrongfully and injuriously" erected there engines in the river. Now in this form of action, where the defendant is not put to plead his title, the plaintiff cannot know, until the thing comes out in evidence what the defendant's title is. If he had exercised that right in a way that was legal, he would have been entitled to the benefit of it; but the same evidence that brings out the right shows that the defendant was exercising it in an illegal manner, by erecting that which was a nuisance in a navigable river. The third

exception is that the Judge was bound to put it to the jury that if they believed the weirs obstructed the navigation of the river, they should find for the plaintiff. I think he was bound to put it so substantially, and I therefore concur with the other members of the Court, that this exception must be allowed.

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Assignee of CLUFF v. QUINN.

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EXCHEQUER
OF PLEAS.
Thurs. 8th May.

INDEBITATUS Assumpsit for the price of goods sold and delivered.

The copy of the writ served upon the defendant had not been endorsed with the amount of the debt and costs, pursuant to the 52nd general rule(a). The writ had

Where a copy of a writ had been served on a defendant in an action of Indeb. ass. for the price of goods sold, &c. but there was no endorsement upon the writ, in pursuance of the 52nd general rule, and the defendant had appeared and a declaration was filed and a bill of particulars delivered in the present term, the defendant was allowed to lodge in Court as of a time previous to the declaration, the sum which he acknowledged to be due to the

(a) Reg. Gen. 52 Upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy, and service and attendance to receive debts and costs; and upon the payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed; but the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The endorsement should be written or printed in the following form:—

“ The plaintiff claims for debt and for costs,
“ and if the amount thereof be paid to the plaintiff or his attorney

plaintiff; and the plaintiff's attorney was ordered to pay the costs pursuant to the rule. It does not disentitle the defendant to such costs that he has given notice, in the alternative, to set aside the writ or the copy of the writ.

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been served on the 28th of January last; the defendant appeared within the regular time, and a declaration was filed, and a bill of particulars was served on the defendant in the beginning of this term. On the 23rd of April last the defendant served a notice upon the plaintiff's attorney, cautioning him against taking any further proceedings.

Ross S. Moore, for the defendant, now moved that the writ, or that the copy of the writ, in this case and the subsequent proceedings should be set aside. The analogous rule in *England* has been held to be directory, not compulsory. The only difference between the *English* rule and the 52nd general rule in this country is, that if the plaintiff's attorney neglect to endorse upon the writ the sum demanded, he shall pay the costs of any motion rendered necessary by the non-compliance with the rule, and this rule must be held to be compulsory as the rule in *England* is; *Ryley v. Boissomas*(a); *Tomkins v. Chilcote*(b). [PENNEFATHER, B.—The *English* rule contains no such sanction as that in the concluding part of the *Irish* rule.] Mr. *Yeo* remarks on this rule that it is a most salutary one, and may be the means, in many cases, of staying proceedings and settling the action in *limine*. It might be contended that this application should have been made in the first instance, if the rule were to be held to apply to all actions, whether for a sum certain or for unliquidated damages; but this Court has

"within four days from the service hereof, further proceedings will be stayed."

In case such endorsement shall not be made the plaintiff's attorney shall pay the costs of any order which may be made by the Court for staying the proceedings, on payment of debt and costs.

(a) 1 Dow. Pr. C. 383.

(b) 2 Dow. Pr. C. 187.

decided that it only applies to demands for a sum certain ; *Swiney v. Coghlan*(a). This is the proper time to make the objection. The first intimation we received of the nature of the action was the declaration, and we served notice of this motion immediately after we received notice of the declaration. [BRADY, C. B.—Does the defendant swear that he did not know the nature of the plaintiff's demand ?] The nature of the plaintiff's demand must appear from his own act ; *Davis v. Jones*(b). That case shows that an application of this nature should not be made until the declaration has been filed. We admit that we owe one-half of the demand, and if the Court will permit the money to be lodged as of a time before the declaration was filed, we will do so ; but if we lodge the money now, we shall be obliged to undertake to pay the costs up to the present time. The notice has been advisedly worded in the alternative, so that if the Court should not be inclined to set aside the writ, the copy might be set aside, which we are entitled to have done.

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Flood, contra.—First, the defendant is to late ; secondly, the defendant, having ascertained the debt by the declaration, should have tendered the debt and costs ; thirdly, the alleged defect is not in the writ, but in the copy, and the writ being regular, the defendant should not have brought forward an alternative motion. If the notice were to set aside the writ, the copy only being defective, the rule should be discharged with costs ; *Huggett v. Parkin*(c). *Lloyd v. Jones*(d) was a case upon a writ

(a) 1 Jones, 592.

(c) 1 Bing. 65.

(b) 1 Cr. Mee. & R. 582.

(d) Dow. 161.

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of summons since the uniformity of the Process Act in *England*, and there the endorsement of the residence of the plaintiff's agent was not correctly stated, but in that case no attorney's name was endorsed on the writ; *Goulton v. Hall(a)*. But even if the Court accede to the terms offered by the defendant, the costs ought not to be visited upon us, as we were entitled to come in here to oppose the motion in its full extent.

BRADY, C. B.—It is quite plain that in this case the rule has not been observed, and that it has been departed from by the plaintiff's attorney. Whether the rule be compulsory or not may admit of some discussion, and I have some doubt whether the party is entitled to set aside the proceedings altogether. But I think the Court is entitled, and I may say bound, to put the plaintiff in the same position as if the writ had been endorsed with the sum claimed, by allowing the defendant to lodge the sum which he acknowledges to be due, he undertaking to pay the costs of the writ. If the plaintiff proceeds, he may eventually have a right to the costs of the declaration; and if the verdict should be for the defendant, or if he should have judgment of non-suit, he may become entitled to these costs. As to the costs of this motion, the rule is express: it has been rendered necessary by the neglect of the plaintiff's attorney, and we think it would be hard on the plaintiff that he should pay them;—the defendant ought not to pay them; and the only other party to pay them is the plaintiff's attorney, who must, therefore, pay the costs of this motion.

(a) 7 Dow. 175.

Lessee DENNY v. O'CONNELL.

1842.

EXCHEQUER
OF PLEAS.
Sat. May 7,

THREE ejectments for non-payment of rent. One of these ejectments was for "500 acres, &c., in all that and those, $7\frac{1}{2}$ acres of the lands of Baltigarron, in the county of Kerry." At the trial of this case before Baron Lefroy, at the last assizes for the county of Kerry, it appeared that by an indenture, dated November, 1811, (which was not produced, but which, after proof of proper searches being made, was deposed to by a witness who had seen it,) *Stephen Price* and *Robert Day* demised eight acres, two roods, and thirty-one perches of the lands of *Baltigarron*, to *Doctor Rickard O'Connell*, under whom the defendant claimed, at the yearly rent of £25 *Irish*. The term for which this demise was made did not appear. It was also proved that *Robert Day* survived *Stephen Rice*, and that *Sir Edward Denny*, the lessor of the plaintiff, was the heir at law of *Robert Day*. The defendant gave in evidence a deed of annuity, dated in May, 1822, to which the lessor of the plaintiff was a party, and which contained a recital that the lessor of the plaintiff (then *Edward Denny*, Esq.) was seized of an estate tail in the premises in question, and did thereby grant to *Doctor Rickard O'Connell* an annuity or rent-charge issuing out of the *Denny* estates, (of which the land in question was part,) with a power of distress on any part of the *Denny* estate, in case of non-payment of said annuity or rent-charge. It also appeared by the testimony of a gentleman who had been the agent of the lessor of the plaintiff, that in 1822

A, in 1811, demised $8\frac{1}{2}$ acres of the lands of B, to R, and accepted a surrender of one acre of these lands, and executed a new lease of the one acre to R, in 1822, by an indenture which did not mention any sum to be reserved as the rent of the acre so demised. Held, that the lessor's right of re-entry under the ejectment statutes, was gone by the severance of the reversion.

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a surrender of one acre of the eight acres, two roods, three perches, had been made by the tenant, and that this witness, as law-agent of the lessor of the plaintiff, and of the late Sir *Edward Denny*, his father, had himself prepared and witnessed the said surrender, which was duly executed, and had been given up by him to his successor in the agency in 1829; but the surrender was not produced. The defendant then proved an indenture of 12th September, 1822, made between the lessor of the plaintiff, then *Edward Denny*, Esq., of the first part, Sir *Edward Denny* of the second part, and the said Doctor *Richard O'Connell* of the third part, whereby *Edward Denny*, with the consent and approbation of the said Sir *Edward Denny*, "demised, granted, set, and to farm-let, released and "confirmed" unto Doctor *Richard O'Connell* and his heirs, one acre of the lands of *Baltigarron*, (then in the possession of the said *Richard O'Connell*,) for a term of three lives, with a covenant for perpetual renewal, at the yearly rent of £1 and 1s. renewal fine. This lease contained a covenant by *Edward Denny*, (the lessor of the plaintiff,) for quiet enjoyment by the lessee, in the usual terms. This acre was one of the 8½ acres, 21 roods, and 32 perches, demised by the lease of 1811. It was also proved, that until the year 1829, the annuity payable to the lessee had been set off against the rent, the balance being paid in cash; and that since that time the rent had not been demanded on the one hand, nor had there been any payment of the annuity on the other; but there was no evidence of the termination of the old agreement in this respect, or of the commencement of a new one. The title of the present lessor of the plaintiff accrued in February, 1841, by the death of *Robert Day*, (the surviving lessor in the lease of 1811,) whose heir at law the lessor of the

plaintiff was. One of the other two ejectments was for the one acre thus demised; the other was for a separate holding of five and a half acres. There had been verdicts for the lessor of the plaintiff in all the three ejectments; and the jury had found eleven years' rent to be due at the bringing of the ejectments. The defendant had called upon the learned Baron to non-suit the plaintiff, in the ejectment for the seven and half acres, on the ground that the condition of re-entry of the lessor in the lease of 1811 was gone; the lease of 1822, having operated as an estoppel, and having thus effected a severance of the reversion; the defendant had also contended, in all the cases, that there was evidence to go to the jury of an agreement between the parties to set off the annuity against the rent; the learned Baron refused to nonsuit or to send that issue to the jury, but sent the case to them on the issue raised on the pleadings, reserving for the Court the question whether the defendant had a right so to retain the rent, either by virtue of an agreement to satisfy himself the amount of his annuity out of the rents, or independently of such agreements, inasmuch as he had a power of distress for the annuity over the entire of the *Denny* estates, which included the lands in question.

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Pigott, Q.C. and *D. R. Kane*, now moved that a nonsuit might be entered in the ejectment for the seven and a half acres and that the verdicts in the other two cases might be changed into a verdict for the defendant or the amount of rent be reduced to one year's rent. The condition of re-entry in the original lease of 1811, was gone by the severance of the reversion by the new lease of the one acre. The assignment of a reversion in part destroys, the condition of re-entry at common law, and under the ejectment statutes the landlord cannot enter. The surrender of an old lease, or what

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amounts to the same thing, destroys the condition. *Winter's case* (a); *Knight's case* (b); *Culcoe v. Sharpe* (c) is just the present case. In this country, as well as in England, the ejectment statutes must be applied in reference to the doctrine of common law; that is shown both by the recital and enacting part of 11th Anne, ch. 4, and by the case of *Doe v. Shuwcross* (d); which arose on the analogous English statute (e); also by *Lessee Delap v. Leonard* (f); *Lessee Thompson v. Home* (g). The lease of 1822, operates as a grant of the reversion by estoppel. The Court called on

Hichson, Q. C. contra. This deed of 1822 did not operate as an estoppel, for there can be no estoppel where an interest passes. The rent became apportioned. There was a continuing contract between the parties and the rent was apportioned, since the rent payable for the one acre was not ascertained by the second instrument, so that even if the right of entry was gone at common law, the relation of landlord and tenant, continued to subsist, between the parties and the case was within the ejectment statutes, a full years rent being due; this principle was decided by this Court in *Lessee Keiley v. Aherne* (h).

PENNEFATHER, B.—Taking it on the plaintiff's own showing, Sir *Edward Denny*, was seized in fee in 1822. That disposes of the ejectment respecting the seven and a half acres, and a nonsuit must be entered in that ejectment.

The two other cases were by consent ultimately allowed to be referred to the officer, and all proceedings thereon stayed, without costs on either side; the officer to ascertain

(a) 2 Dyer. 308.

(c) Noy, 126.

(e) 4 Geo. 2. c. 28.

(g) 1 Jebb & S. 424.

(b) 5 Co. 546.

(d) 3 B. & C. 752.

(f) 2 Jebb & S. 704.

(h) Batty, 18. N.

what rent was due to Sir *Edward Denny*, since the death of *Doctor O'Connell*, and to set off against such rent the amount of the annuity due to the defendant, and to strike a balance to be paid by the party, who should appear to be liable to pay the same, in one week after the officer's report should be made.

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HENRIETTA MARTIN, administratrix of MARTIN
v. JOHNSTON,—Clerk.

1842.
EXCHEQUER
OF PLEAS.
Mon. 9th May.

ASSUMPSIT by the plaintiff as administratrix of *Aylmer Richard Martin*, deceased, against the defendant as acceptor of several bills of exchange, payable to the said *Aylmer Richard Martin*. There had been a verdict for the defendant at the trial of this cause before Baron *Lefroy* at the last assizes of *Cork*; and the plaintiff had then prayed the Judge that the defendant might be disallowed his costs pursuant to the 3 & 4 Vict. c. 105, s. 66; but the learned Baron did not think it was competent to him, as Judge of assize, to interfere in the question

Where an action had been commenced by an administratrix in respect of the amount of several bills of exchange which appeared by the intestate's books to have been due to him by the defendant, and it appeared that there had been several dealings between the defendant and intestate, and that within six

months before the intestate's death, he had been heard to say, that the defendant was considerably indebted to him, and that the plaintiff believed up to the time of the trial, that the defendant was so indebted, and that offers of arbitration and settlement had been made before the trial to the defendant, who had admitted that something was due to the intestate, and said that he would shortly make a payment on account to the agent of the plaintiff; but after action brought, stated, that he was not indebted to the plaintiff, but refused to state the nature of the credits: it also appeared by the report of the Judge, that the case was one of complicated accounts in which the evidence principally consisted of documents shewn for the first time at the trial. On an application to disallow the defendant his costs, under 3 & 4 Vic. c. 105, sect. 66, the Court refused the application.

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 v.
 JOHNSON. of costs (a), but had expressed his opinion that this was a case in which the defendant ought to be disallowed costs.

Pigot, Q. C., with whom was *B. Keller*, now moved the Court that the defendant might be disallowed his costs in this case and be restrained from taxing such costs or making up any judgment thereupon. They moved upon the affidavit of the plaintiff and of a Mr. *Crofts*, who had been the confidential agent of the plaintiff, which detailed the following facts:—It was sworn that *Aylmer R. Martin* had been an attorney, and for some years before his death, which took place on 2nd April, 1841, had acted as attorney and solicitor for the defendant, and had advanced several sums of money for him; that there had been money dealings and accounts between the defendant and *Aylmer R. Martin*: that *Aylmer R. Martin* had died intestate in April, 1841, after only five days illness: that the plaintiff had frequently heard him say, within six months previous to his death, that the defendant was considerably indebted to him; and that up to the time of the trial, the plaintiff believed the defendant to have been considerably indebted to her as administratrix of *Aylmer R. Martin* on foot of the bills mentioned in the declaration: and that she was wholly ignorant, up to the time of the trial, of the pay-

(a) Sect. 66, enacts "that in every action brought by any executor "or administrator in right of the testator or intestate, such executor "or administrator shall, unless the Court in which such action is brought, "or a Judge of any of the said superior Courts shall otherwise order, "be liable to pay costs to the defendant in case of being nonsuited, "or a verdict passing against the plaintiff, and in all other cases in which "he would be liable if such plaintiff were suing in his own right upon a "cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

ments by the defendant to *Aylmer R. Martin*, which had been proved at the trial. *Crofts* swore that he had been employed by the plaintiff to call in the debts of the deceased and to wind up his affairs; that upon searching the papers of the deceased he had found several bills of exchange, for the amount of which this action was brought; that in May, 1840, he had made an application to the defendant to settle with him the account respecting the said bills, and requested the defendant to show any credits to which he was entitled, or any payments which he had made, which he would be allowed; and he (*Crofts*) offered to produce any books and papers of the deceased to the defendant any time, and proposed that if any difference should arise, on the inspection of such papers, &c. it should be referred to arbitration:— that he had also asked the defendant to accept a bill on account of the sums due by him to the plaintiff as such administratrix, which the defendant had declined to do, alleging that he had too many bills out, but admitted that something was due to *Aylmer R. Martin*, and said that he would shortly receive a sum of money from government for tithes due to him, and that he would then make a payment on account to the deponent. That several offers were made to the defendant to come to an account with the plaintiff, or to refer the case to arbitration, and that the deponent had stated to the defendant as a reason for an immediate settlement, that some of the claims would soon be barred by the Statute of Limitations; to which the defendant replied, that *Aylmer R. Martin* had behaved honorably towards him in his life time and that he (the defendant) would act honorably to his (*Martin's*) widow and children. That *Crofts* had caused the writ in this case to be issued and

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served two or three days before the time when the first of these bills would have been barred by the Statute of Limitations; and that some time after the action was brought, the defendant for the first time alleged that he was not indebted to the plaintiff, but still refused to state the nature of the credit to which he claimed to be entitled. That deponent again offered to refer the case to arbitration, which the defendant refused to do, though he had on one occasion, after the filing of the declaration, actually requested *Crofts* to prepare a consent for that purpose. *Crofts* also swore that he was wholly unaware of any payments made to *Aylmer R. Martin* by the defendant until after notice of trial in this case was served, but that he had believed that the defendant was indebted to said *Martin* in the sum of £300 or £400: that he had searched through the papers of *Martin* and found nothing therein to the contrary; and that he believed that if a fair account were taken of all the transactions, the defendant would be found considerably indebted to the plaintiff as such administratrix.

The defendant swore that when *Crofts* had offered to refer the case to arbitration he had insisted that the arbitrators should be attorneys of the city of *Cork*, and that he, the defendant, had offered to leave the case to merchants or country gentlemen. That the plaintiff had laid her venue in *Dublin* and that the defendant had charged the venue, but had been ordered to pay costs to the plaintiff, and that a motion by the defendant for a further bill of particulars had been refused with costs. He further swore that *Aylmer R. Martin* died in his (defendant's) debt to the amount of £500, which defendant had left in his hands to pay a debt to that amount to

one Mr. *Hugh Kinnears*. He stated that *Crofts'* request to him to come to a settlement had taken place shortly after the death of *Aylmer R. Martin*, upon the defendant having gone to the office of *Crofts* to demand payment of the money due to him—that the action was brought without any notice whatever having been given to the defendant, and that *Crofts*, after action brought, offered to refer the case to the arbitration of attorneys, to which defendant refused to accede, but that he was always willing to have referred the case to merchants or country gentlemen. He denied that he had made the promise to make a payment on account, as stated in the affidavit of *Crofts'* or that he had said he would act honourably, but said that he would act *honestly*. Mr. *R. Martin*, brother of the deceased, made an affidavit in which he swore that he had been counsel for the plaintiff at the trial, and that after the trial he had met the defendant in Cork who had proposed to him that the plaintiff should give up the costs of his motion which had been given against him.

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BRADY, C. B. This was a case, as reported to us, of extreme complication of accounts, and in which various attempts had been made by the plaintiff to effect an arrangement, and in which it was stated in evidence that the defendant had confessed before action brought, that “there was money due to the plaintiff.”

LEFROY, B. There was a great deal of trouble in tracing the account through several of the bank books. I thought that though the jury had come to a right conclusion, this was not a case in which the Court should allow costs. We should prefer to hear the defendant.

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The learned Baron read his report of the case, and stated that the credits were proved by documents shown for the first time at the trial, some of which were very complicated and unintelligible.

Bennett, Q. C. and *Henn*, Q. C. for the defendant. This case will establish a very dangerous precedent, should the Court disallow the defendant's costs. The declaration contained 26 counts for the amount of 12 bills of exchange, and a considerable sum of money is claimed on foot of them. Some of these bills were obviously renewals of others, as the amount of the second bill is exactly that of the first bill and interest, and the last bill was paid. The bill of particulars did not give the defendant a single credit. The complication of the accounts was due to *Aylmer R. Martin* himself, and it would be very hard to visit this upon the defendant with costs, because *Martin*, an attorney, did not keep his accounts properly, but in a negligent manner. No letters were sent to the defendant, or demand made in writing upon him, previous to bringing the action. The language of the *English* statute 3 and 4 Vict. c. 42, is the same as that of the 3 and 4 Vict. c. 105, and the English act gives the defendant costs against executors unless the Court shall take them from him; *Wilkinson v. Edwards*(a). The exemption of executors was only from an accidental omission in the statute of Henry VIII. and the late statute was passed to amend the law in that respect. The defendant was not bound to disclose his defence before the trial: *Southgate v. Crowley*(b) is a stronger case than that before the Court; Chief Justice *Tindal* there says, "I should be sorry if a

(a) 1 Bing. N. C. 301.

(b) 1 Bing. N. C. 518.

“defendant could be called on to disclose the nature of his
 “defence; except, perhaps, where he has a testator’s receipt
 “in his pocket, or the question turns upon the production of
 “a forged instrument.” The executor must show a special
 exemption; *Engler v. Twisden*(a). In *Lysons v. Barrow*(b)
 the Court was wrong in two respects, and that case is over-
 ruled by *Ashton v. Poynter*(c). There must have been
 actual misconduct on the part of the defendant to entitle
 the plaintiff to maintain this motion. *Farley v. Briant*(d);
Godson v. Freeman(e).

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B. Keller in reply.—The nature of the defence set up
 by this defendant appears from the report of the Judge; it
 altogether depended on the documentary evidence produced
 by himself. Notwithstanding the defendant’s promise
 (sworn to by Mr. *Crofts*) that he would behave
 honourably, yet he afterwards pleaded the statute of limit-
 ations. It was necessary to include all the bills of exchange
 in the plaintiffs declaration, for we did not know how the
 bills were circumstanced, but we did not at the trial insist
 upon such of them as appeared to be renewals. It is not
 necessary as stated by Mr. *Bennett*, that there should be
 actual misconduct on the part of the defendant to entitle
 the plaintiff to maintain this motion; but were it so, the
 conduct of this defendant would amount to such. The
 rule is, that there must be some want of candour, such
 conduct on the part of the defendant such as would
 be likely to lead the plaintiff astray. *Lysons v.*
Barrow (f) has been overruled on one point, not in

(a) 2 Bing. N. C. 263.

(c) 1 Cr. Mee. & R. 738.

(e) 2 Cr. Mee. & R. 585.

(b) 10 Bing. 563.

(d) 3 Ad. & Ell. 839.

(f) 10 Bing. 563.

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question here, that case proceeded on the ground that the conduct of the plaintiff in bringing the action was vexatious. In *Wilkinson v. Edwards*(a), there had been vexatious proceedings on the part of the plaintiff in incurring unnecessary and wanton expenses, the plaintiff having commenced the action without preparing any evidence, and having twice violated peremptory undertakings to go to trial. But it was decided on grounds which do not affect us here; for every exertion was used by the plaintiff to discover the real facts of the case before we went to trial. In *Southgate v. Crowley*(b) the plaintiff was guilty of some want of candour, and it was held that the mere circumstance of the plaintiff having acted *bonâ fide* is not sufficient in such a case to entitle him to the costs when there was no misconduct in the defendant. There Chief Justice *Tindal* says, as cited by Mr. *Bennett*, “I should be sorry that a defendant was obliged to disclose his defence, unless perhaps “he had the receipt in his pocket.” Now here the defendant had in his possession receipts, or what were tantamount to receipts, vouchers; for he had Martin’s acceptances of the defendant’s own bills, and not only would he not produce these vouchers when requested, but refused entirely to say what his defence was. In *Engler v. Twisdell* there was gross negligence; and that is assumed by the *Chief Justice’s* judgment in p. 866. In *Godson v. Freeman* Baron *Park* says, that if the plaintiff had applied to the defendant to ascertain if he had any receipts, and the defendant had concealed them from his knowledge, and so vexatiously induced the plaintiff to prosecute a hopeless suit, the case might be one calling for the interposition of the Court. In *Johnson v. Cottingham*(c) the application was refused on

(a) 1 Bing. N. C. 301. (b) 1 Bing. N. C. 518. (c) 1 Jebb & B. 31.

peculiar grounds; 1st, delay, for more than 10 months; 2ndly, on account of the nature of the demand. That was a case of clear misconduct of the plaintiff, and therefore is no authority against the present application.

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BRADY, C. B. This is an application founded on the 56th section of the recent act, 3&4 Vic. c. 105, that the defendant may be declared not entitled to his costs, the verdict having passed for him on the trial of the case. The plaintiff sues as administratrix of *Aylmer R. Martin* deceased; and by the 66th section of the act above cited it is enacted that in every action brought by any executor or administrator in right of the testator, he shall be liable to pay costs to the defendant in the event of a verdict passing against him. (His Lordship read the section.)

Prior to the passing of the recent statute, whether from the construction of the language of the statutes giving costs, or from particular reasons of policy, or from the expediency of relieving persons suing on contracts to which they were strangers, executors were held exempted from payment of costs; it is not now for us to consider on what ground that rule rested. We are now fairly warranted in considering the principle which exempted executors and administrators from costs to be unsound, and that the legislature thought it right that no person against whom actions are brought should be harrassed by claims without being fully indemnified against the costs incurred by him in resisting demands which prove unfounded; all other considerations are excluded. The particular reasons for the exempting of executors from costs are no longer tenable, and personal representatives are put on the same footing as ordinary persons as to their liability to costs, when unsuccessful in

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actions brought by them, with one exception, namely, that the judge or the court may deprive the defendant of the costs in a fit case. It is on those grounds that I concur in the decisions of the English courts, that it is not on any difficulty or complexity in the case, or on the bona fides of the plaintiff in bringing the action, but that it is on the misconduct of the defendant that in each case the exemption must depend. I think we may go further and say it is necessary that the misconduct must be such as to tend to mislead the plaintiff in commencing or continuing the action. Now the grounds alleged here are, that the defendant in a conversation between him and *Crofts* admitted that something was due, and promised to make a payment on account. Had he said a particular sum was due, and had an action been brought for that sum, and he had then shown it paid, the case might be different; but where there are extensive and complicated accounts, and the defendant, not clearly knowing how the accounts stand, makes such an admission, I cannot hold that the defendant must pay the costs of investigating these accounts. It is also said that the defendant was called on to produce his accounts and state his credits, and that he declined to do so. I would be very slow to say that a party is bound to produce his accounts and submit them to the investigation of his opponent, on the mere chance of his abiding by the result of this investigation if adverse to him. But the important point is, was the plaintiff misled by the misconduct of the defendant? Now the plaintiff here has made an affidavit, but he does not say that he has been misled by the defendant; on the contrary it appears pretty distinctly that she was misled by her husband, for she says, that from the expressions of her husband, she was under the impression that a considerable sum was due to him by

the defendant. On the whole therefore we cannot say that the defendant has been guilty of such misconduct as to be deprived of his costs to which he is entitled by the verdict for him.

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LEFROY, B. I had a strong impression against the defendant in this case from what appeared before me on the trial, for I thought the defendant had acted in such a manner as to mislead the plaintiff. It was to be presumed that the plaintiff had proceeded on the admission of the defendant, and therefore I thought the defendant should be deprived of his costs. But it now appears, as it was said by the Chief Baron, the plaintiff has made an affidavit and has not stated that she was so misled by the defendant, but by her husband. Another circumstance which influences my present opinion is, that the conduct of *Crofts* does not now stand as at the trial, as much of it is contradicted or explained by the defendant's affidavit. I concur with the other members of the court that it is only in a clear case of misconduct or fraud of the defendant in which the court should interpose its discretion to deprive him of his costs, and therefore I agree in thinking that this motion must be refused, but without costs.

The rest of the Court concurring,

Motion refused, without costs.

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EXCHEQUER
OF PLEAS.

Wed. April 25.

MORROUGH v. POWER.

Where a judgment had been entered in 1807, and no action, suit, or other proceeding within the meaning of the 8 Geo. I. c. 4, *Irish*, had been taken upon it for more than 20 years, such judgment is barred, notwithstanding that an acknowledgment in writing of the debt had been given in the year 1827.

SCIRE FACIAS to revive a judgment, obtained by *Walter Morrough*, (whose executor the plaintiff was) against the defendant, in Trinity Term, 1807, upon a bond and warrant of attorney for £426. To this the defendant put in several pleas of the recent statute of limitations, and a plea of payment under 8 Geo. I. c. 4, *Irish*. The *scire facias* was of the 11th January, 1839, the judgment being 32 years old when the *scire facias* was issued. No other proceeding had been taken on foot of the judgment since the rendition, nor payment or satisfaction made of principal or interest.

Semble, an acknowledgment of a debt in the schedule of an insolvent, is a sufficient acknowledgment in writing under 3 & 4 Wm. 4, c. 27, sect. 40.

At the trial of this case at the sittings after *Michaelmas* Term, 1840, before the Lord Chief Baron, the plaintiff gave in evidence the bond of the defendant, and a schedule signed by the defendant, dated 5th March, 1827, which appeared to have been filed in the Insolvent Court by the defendant, on 9th March, 1827, which contained an entry of a debt of £220, therein stated to be due to the plaintiff's testator, with the word "admitted" written opposite to the sum in the proper column, and the observation, (also in the proper column) "as well as I can recollect this is the amount of my bond exclusive of interest and costs." The plaintiff also produced an affidavit of service of the order of the Insolvent Court for the hearing upon the plaintiff's testator.

The plaintiff here closed his case, and the defendant's counsel called upon the learned Chief Baron to direct a verdict for the defendant, inasmuch as the judgment had been recovered more than 20 years before the issuing of the writ of scire facias; and inasmuch as no action or suit, either in law or equity, had been prosecuted for the recovery of the debt due or secured by the said judgment, nor had any interest or money been paid, or other satisfaction made on account thereof, within twenty years next before the commencement of this suit; but the learned Chief Baron refused to do so, and informed the jury that, if they believed the evidence, they should find for the plaintiff, although no sufficient evidence, in his opinion, had been given on the part of the plaintiffs to deprive the defendant of the bar given by the 8 Geo. I. c. 4, Ir. if that statute were now in force as to judgments, but which act was now, in his opinion, repealed by the 3 and 4 W. IV. c. 27; and therefore, as the defendant had not relied on or proved an actual payment of the said debt secured by the said judgment, the jury should find a verdict for the plaintiffs; to which the defendant excepted, and required a direction for the defendant on the grounds following:—

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1st. That no action, suit, or other proceeding had been commenced or prosecuted for recovery of said debt, nor any interest or other money been paid, or other satisfaction made on account thereof, within 20 years next before the commencement of this suit;—

2ndly. Inasmuch as more than 20 years had elapsed from the recovery of the judgment and before the passing of the 3 and 4 Wm. IV. c. 27, that the recovery of the

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said debt became and was under the circumstances and upon the pleadings and evidence, barred, even though the statute 8 Geo. I. were repealed.

3dly. Inasmuch as more than 20 years had elapsed between the recovery of the judgment and the passing of 3 and 4 Wm. IV. c. 27, and no suit had been prosecuted for the recovery of said judgment, nor any interest paid or other satisfaction made on foot thereof, within 20 years next before the passing of 3 and 4 Wm. IV. and,

4thly. Inasmuch as a present right to receive the said sum secured by the said judgment in the writ of scire facias mentioned, had accrued to the said *Walter Morrough*, being a person capable of giving a discharge for a release of the same, more than 20 years before the commencement of this suit; and no part of the principal money, nor any interest thereon, had been in the mean time paid, nor had any acknowledgment of the right thereto been given in writing, signed by any person to whom the same was payable, or his agent, to any person entitled to receive the same, or his agent.

The judge refused thus to direct the jury to find for the defendant, and told them that the schedule was a sufficient acknowledgment of the debt secured by the said judgment to take the case out of the statute 3 and 4 Wm. IV. c. 27. To this the defendant excepted, on the ground that the schedule was not a sufficient acknowledgment; and if it were, that inasmuch as it was not given by the defendant nor any agent on his behalf to *Walter Morrough* or his agent, it would not prevent the operation of the statute; and required the judge to direct a verdict for the defendant,

not only on the grounds aforesaid, but also because that even if the schedule and notice thereof could be considered a sufficient acknowledgment, if filed after the passing of the 3 and 4 Wm. IV. c. 27, yet as the debt was barred at the time of the passing of that act, it could not be revived thereby; but the judge refused so to direct the jury. The defendant also insisted that even though the act 8 Geo. I. was repealed as to proceedings to obtain execution against land or rent, yet the plaintiff having sought execution in the present case against the defendant, the same was not a proceeding within the meaning of the act of Wm. IV.

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The jury under the direction of the judge found a verdict for the plaintiff.

Berwick, Q. C. in support of the exceptions. We contend that the Irish act 8 Geo. I. c. 4, was not repealed by the late statute of limitations, which is a general act and which does not expressly declare that the former act shall be repealed. Both statutes may be taken together; and if a defendant pleads payment, the plaintiff cannot rely upon an acknowledgment in writing as an answer to that plea. All that was necessary to the 8th Geo. I. was to issue a scire facias to revive the judgment, which was a sufficient proceeding, but the statute of Wm. IV. also requires an acknowledgment in writing from the party: the legislature may have thought fit to leave the law in Ireland as it stood before the passing of the latter act, so far as it related to "proceedings;" and to add to what was already a limitation, the necessity of an acknowledgment in writing. If the acts are not inconsistent they must both stand together, as there is no repugnance between them. *Dwarris on Statutes*,

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764. It was much considered in *Paget v. Foley*(a) how far a prior statute is repealed by a subsequent one on the same subject: there the second act was plainly inconsistent with the former, but here there is no reason why the two acts should not exist together: a proceeding is necessary and an acknowledgment also. In *Brady v. Fitzgibbon*(b) the court of *Queen's Bench* has held that an acknowledgment alone was not sufficient. In *Lanigan v. Fogarty*(c) the court of *Common Pleas* considered that the proceedings under the 8 Geo. I. were sufficient to entitle the plaintiff to revive his judgment, which does not look as if they considered the first statute to be repealed. So in a case before Mr. Justice Crampton, *Martin v. Cunningham*(d). [BRADY, C. B. In that case the defendant had not pleaded the statute.] The judgment was gone by law and barred in 1827. Is it then to be set up again in 1833?

The case was not argued on the question of the sufficiency of the acknowledgment.

Collins, Q. C. and *Napier*, for the plaintiff. The acknowledgment was sufficient. In *Trulock v. Robley*(e), an acknowledgment given to the grandfather of an infant mortgagor though the grandfather was not authorised to act as the agent of the mortgagor, was considered sufficient to establish the right of redemption. The 8 Geo. I. c. 4, did not give the plea of payment for the first time, for payment might have been pleaded at common law to an action of debt on a bond, as, by the statute, it might afterwards be pleaded to an action on a judgment; and

(a) 2 Bing. N. C. 679.

(c) 3 Ir. L. Rep. 185.

(e) 5 Jurist, 1101.

(b) 1 Jebb & S. 503.

(d) Armstr. & Mac. 149.

before the act of Geo. I. an acknowledgment in writing of the debt would have been a sufficient answer, to a plea of payment: but the object of that statute was to limit the common-law-right of the plaintiff. Afterwards it was considered unjust that an acknowledgment of the debt should not have the same effect as at common law, and the act 3 and 4 Wm. IV. was passed, which prevents the defendant relying upon a merely statutable defence which is now considered to be unconscientious. The present act has been held to be retrospective in its operation. *O'Sullivan v. M'Sweeney (a)*. It is indeed impossible that the two acts can work together; and the reasonable construction is, that the word "acknowledgment" should now be substituted for "proceeding," in the act of Geo. I. Previously to the statute of Wm. IV. it was sufficient answer to a plea of payment to a scire facias, to show a proceeding of any kind on foot of the judgment, within twenty years from the rendition of it, *Smith v. Creagh (b)*; but that act now authorises any one to whom an acknowledgment, in writing, of the debt to which he is so entitled has been given, to sue upon the judgment for twenty years after the acknowledgment. The object of the statute of limitations was to introduce an entirely new code with respect to judgments, and there can be no difference in the construction to be put upon it in *Ireland* from that which it has received in *England*, *Irwin v. Ormsby (c)*; *Paget v. Foley (d)*.

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Brewster, Q. C., in reply.—In the case in the *Queen's Bench*, *Brady v. Fitzgibbon (e)*, an application was made

(a) 2 Ir. Law Rep. 89.

(b) Batty 474.

(c) 2 Jebb & S. 91.

(d) 2 Bing. N. C. 279.

(e) 1 Jebb & S. 503.

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to Judge *Perrin* to allow a *scire facias* to issue to revive a judgment more than twenty years old, an acknowledgment in writing, in the terms of the recent statute, having been given to the conuzee the day before the application. It would be a strange construction to put upon the statute of limitations if the Court were to hold that it has the effect of reviving an old debt, which, without it, would have undoubtedly been barred by the statute of Geo. I.

BRADY, C. B.—This case comes before the Court upon a Bill of Exceptions, and raises some important questions on the late statute, 3 & 4 Wm. IV. c. 27, s. 40. On all those questions, except one, the Court does not feel called on to pronounce its judgment. There is certainly a question raised upon which I have already expressed my opinion, namely, whether the 8th Geo. I. is to be considered as repealed, as to judgments, by the subsequent statute. But although I have at times intimated an opinion in the affirmative, and given reasons for holding it to be so, I am not to consider myself bound by that opinion on future argument, if I shall feel myself to have formed it on erroneous grounds. There is a distinct question upon the record, on which we feel that we can give judgment for the defendant. The judgment was of 1807; it appears that from 1807 to 1833 no payment of principal or interest had been made or any proceeding taken for the purpose of recovering this debt in any court of law or equity. Therefore if a *scire facias* had been brought before the statute of Wm. IV. upon this judgment, a plea of payment would have decided the question, such plea being by the 8 Geo. I. c. 4, an effectual bar. That statute is material in some other parts: the 1st section, after reciting the mischiefs it was intended to remedy, proceeds to legislate with respect to them, and

declares that all persons entitled to any debt, &c., secured by bond, judgment, &c., which hath been due and payable by the space of 20 years before the 25th December, 1721, or longer, where no suit hath been prosecuted for recovery thereof, or any interest or other sum or sums of money paid or received, or other satisfaction made on account thereof, by the space of 20 years before the 25th December, 1721, may prosecute their suits for recovery of such debts within the space of 2 years, to be computed from the 25th December, 1721, or, in default thereof, such debt or debts shall be presumed to be satisfied and paid. Thus declaring, without any reference to any pleading, that the debt shall be presumed to be satisfied and paid. Those words are not contained in the second section; but they are important in order to guide the Court to the true intent of the legislature in that statute. That being the state of the law, the 3 & 4 Wm. IV. c. 27, was passed; and that Act professes to be "An Act for the Limitation of Actions and Suits relating to Real Property, and for Simplifying the Remedies for Trying the Rights thereto." But it is contended that it shall be in this particular case an Act to revive stale demands, barred years before by the operation of the former Act. We may assume that this acknowledgment was given 19 years and 364 days before the passing of the 3 & 4 Wm. IV. c. 27, and that the revival was 19 years and 362 days before the acknowledgment. Then it is contended that the acknowledgment would have the effect of keeping alive the debt, which, under the 8 Geo. I. must have been barred nearly twenty years before the late Act was passed. We are therefore to see whether we are coerced by the words of this act:—Now the words of the statute are these:—That after the 31st December, 1833, no action, suit, or other proceeding, shall be brought to

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recover any sum of money, secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same, shall have accrued to some person capable of giving a discharge for, or release of, the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been given in writing, signed by the person to whom the same shall be payable, &c. I apprehend that, in considering the operation of this section, we are to hold that it contemplated an action, &c. which, but for the operation of the Act, would have been available to enforce the plaintiff's demand, and that it does not confine the operation of the statute to the matters specified in it; but, that if the defendant can show any other defence, he may do so.

But the words also are "secured" by the "judgment" in question. Now we have the language of the legislature in 1828, saying that the intention of the Act of Geo. I. was to bar such debts as it relates to, for they provide in the 7th section that that Act shall not be extended to set up or give validity to any judgment which, by the lapse of twenty years from the entry or recovery thereof without any payment or satisfaction being made on account, or any proceeding taken for recovery thereof, is *legally or equitably extinguished or barred* under the 8 Geo. I. not referring to the pleadings in the cause, or to the defence set up by the party: they treat it as a bar which would extinguish the debt as effectually as a release. We consider then that we may hold that we are not coerced by the words of the Act of Wm. IV. and that all judgments which were at the passing of that statute barred by the 8 Geo. I. are left as they were, and are not revived thereby, but that the

Act of Wm. IV. refers only to existing debts. There must therefore be judgment for the defendant.

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PENNEFATHER, B. and RICHARDS, B. concurred.

LEFROY, B.—I think the very structure of the Act would alone be sufficient to maintain the construction we now put upon it. It is an Act in the negative; and it would be in vain to say that the exception could apply to any proceedings to which the Act of Parliament would not have been a defence.

PENNEFATHER, B.—We are bound to give such judgment as upon the whole record appears right.—Allow the second exception, and let there be judgment for the defendant on the whole record.

Napier then urged that the plaintiff should not be saddled with costs, as the justice of the case was with him, and cited *Glover v. Nagle*, from *Kelly on Scire Facias*. This was opposed by

Brewster;—In *Scire Facias* the defendant is entitled to costs as against executors, and so it was held in a case in which I was concerned, in the *Queen's Bench*. In this case the executors should pay costs, as the only reason why executors were held not to be liable to costs, was, that they might have been supposed to be ignorant of the affairs of their testator; but, here, they have themselves raised a question of law upon the record.

Per Curiam.—This is not the time at which to discuss the question; it should be made the subject of an independent application.

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In re DEASE.

EQUITY
EXCHEQUER.
Thurs. 12 May.
 The Court will not exercise its discretion in relaxing the rule prescribed by the statute concerning the period of an attorney's apprenticeship, where the apprentice had been incapacitated by illness from serving 5 of the 20 terms, though it was sworn that he had attended his master's office for 3 years before he was bound, and his master had consented to his being now sworn.

Semb. The Court will not take notice in such cases of the applicant's family affairs, except where a father has been an attorney and there is danger of the business of the office being lost to his family.

MR. Bennett, Q. C., applied to the Court that *Mr. Dease* might be admitted an attorney of this Court under the following circumstances:—He had served in the office of *Mr. Harris*, one of the attorneys of the Court for three years previously to the 25th June, 1837, when his indentures were executed and he became apprentice to *Mr. Harris*. In the summer vacation of 1840 he went, with the consent of *Mr. Harris*, to the country, where he was taken ill, and could not attend the office for five terms. He had served twenty terms, with the exception of these five. He swore that he had several sisters depending on him for support; and *Mr. Harris* had consented to his being sworn.

PENNEFATHER, B.—We are pressed constantly to go out of our regulation under circumstances of some peculiar hardship to individuals. This gentleman has not served the full time required by the statute; I do not mean to say that the Court cannot exercise a discretion in such matters, but illness of the party applying has never been taken into account as a reason for doing so. It is said that he has sisters depending on him for support; now the only case in which the Court has relaxed its rule on account of the situation of the applicant's family is, when a father who has been an attorney has died and the business of his house is likely to be lost to his young family, unless there be some one to conduct it. In such a case we have relaxed the rule; but I do not think this is a case for doing so.

Motion refused.

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EXCHEQUER
Thur. 12 May.

By indenture of 10th May, 1796, *George Lidwell* demised to *Thomas Roe* all that the lands of *Drimard*, containing, &c. in the county of *Tipperary*, to hold to the said *Thomas Roe*, his heirs and assigns for a term of three lives, with a covenant for perpetual renewal, subject to the yearly rent of £1 10s. (late currency) per acre, being £340 2s. 6d. in all, and £40 renewal fine. *Thomas Roe* died in 1806, seized of the said lands, having devised part thereof, containing about 135a. 1r. 0p. with the bog and commons thereto belonging to his son, the said *Charles Roe*, his heirs and assigns, subject to £202 17s. 6d. of the above mentioned rent, and the remainder of the said lands to his other son *George Roe*, subject to £137 5s. the residue of the above mentioned rent. On the 11th of April, 1806, the plaintiff obtained a judgment against the said *Charles Roe* for £88 debt and costs, which was the subject matter of the present suit. On the 13th April, 1806, *Charles Roe*, by a voluntary deed assigned his interest in his part of the said lands to his brother *Peter Roe*, who entered into possession, but no question arose on the fact of this deed being only voluntary. By indenture of 29th May, 1834, made between the said *Peter Roe*, of the one part, and the

A. demised certain freehold lands, held by a lease of lives renewable, to C. and G., and directed in what proportions they should pay the headrent; C. suffered a judgment to be entered against him, and allowed an arrear of headrent and renewal fines to accrue in respect of his share, and then by a voluntary deed conveyed his share to G. who paid off the arrears of rent and fines, and entered into possession of C's share. On a bill filed by the judgment creditor. Held, that G. was not entitled to repudiate the conveyance as an absolute sale to him, and to claim as an incumbrancer against the

estate the amount of fines and rents so paid by him, but that he was a purchaser thereof; and a sale was decreed against him.

A receiver will not be appointed in this Court after a final decree.

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said *George Roe* of the other part, reciting that the said *Peter Roe* had suffered an arrear of the part or apportionment of the head-rent payable by him as aforesaid for the said lands, to become due to the amount of £706 11s. 3d. up to the 1st of May then instant, and had applied to the said *George Roe* to pay for him the said arrear of rent to the head landlord of the said premises, and that in consideration thereof *Peter Roe* had proposed and agreed absolutely to sell and convey to the said *George Roe* his (*Peter's*) share or division of the said lands for the price or sum of £706 11s. 3d. and that he the said *George Roe* had, at the instance and request of the said *Peter*, paid said sum in satisfaction of the rent which was so due and owing by him (*Peter*) for the said lands, the said *Peter Roe* in consideration of the said sum of £706 11s. 3d. paid by the said *George Roe*, before the execution of the same indenture in satisfaction and discharge of the arrear of head-rent which was due and owing as aforesaid by the said *Peter*, and in consideration of 10s. to said *Peter*, paid by said *George*, he the said *Peter Roe* granted, bargained, sold, released, and confirmed to the said *George Roe* (in his actual possession, &c.) and his heirs, all that part of the lands of *Drimard* formerly in the possession of *Charles Roe* and late in the possession of the said *Peter*, *Habendum* to *George Roe*, and his heirs and assigns, for the lives of the then *cestui qui vie* of the lease of 10 May, 1796, and all such other lives as should thereafter, from time to time, be added thereto, subject to the due proportion of the rent (as herein-before mentioned) and to a moiety of the renewal fines. This deed contained the usual covenant for quiet enjoyment “free and clear and freely and

“ clearly acquitted, exonerated, &c. or otherwise, by
 “ the said *Peter* saved, defended, and kept harmless,
 “ &c. from all recognizances, judgments, extents, &c.
 “ of the said *Peter* or of the said *Charles Roe*.”

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George Roe entered into possession under this conveyance, and on 20th December, 1838, procured a renewal of the premises from the head landlord to himself. *Charles Roe* having died without issue, the plaintiff in 1830, revived her judgment against *Peter Roe* as his heir, and the terre tenants of the lands, and on 10th November, 1837, filed this bill against *George* and *Peter Roe*, charging that *Peter* was heir and personal representative of *Charles*. This was denied by the answers, and on the 28th November, 1838, the bill was amended by making parties to the suit, the defendants *Robert Roe*, the real heir of *Charles*, and *J. De Lisle*, a personal representative raised for him. The cause came on to be heard on 29th May, 1840, when it was decreed the bill should be taken *pro confesso* against *Robert Roe*, and that an account should be taken of the real, freehold and personal estates of *Charles Roe*, and of his debts and funeral expenses, and of all incumbrances affecting his said real and freehold estates; and that if it should appear that *Charles Roe* was entitled to any part of the lands of *Drimard*, that the Remembrancer should inquire and report whether *George Roe* had paid and advanced any, and what sum, for head-rent, renewal fines or otherwise, on account of the said lands, and under what circumstances, and whether he was reimbursed any and what part thereof, allowing the said *George Roe* interest on the said advances; and all equity was reserved until the return of the said report.

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The report found that *Charles*, on the death of his father, had been seized of the said premises, and also of a freehold interest in a house and land in the town of *Donamore* in the *Queen's* county, by virtue of a lease of lives renewable for ever : That one *Peter Alley* had obtained possession, as an *elegit* creditor of *Charles*, of a moiety of the lands of *Donamore* only, and that there was still due to him as such creditor, £218 18s. 3d. He also found the foregoing facts, and that a sum of £598 0s. 1½d. being due to the head landlord to 1st November, 1833, a conditional order for an attachment was obtained on 7th March, 1834, against him, by the Receiver in the case of "*Maher v. Lidwell*," in Chancery, who had been appointed to receive the rents reserved by the lease of 10th May, 1796 ; and a further gale of rent having become due to 1st May, 1834, (making together £645 17s. 7d.) such conveyance as above mentioned had been executed by *Peter Roe* to *George Roe*, who had entered into possession of the lands thereby conveyed, and had on 28th December, 1838, obtained a renewal of the lease of 10th May, 1796, having paid £120 for fines, septennial fines and interest.

The case now came on to be heard on sequestration against *Robert Roe*, and upon report and merits against the other defendants.

Mr. Sergeant *Moore*, and Mr. *Collins*, Q. C. for the plaintiff.

It may be now urged for *George Roe* that he has a right to prefer to stand as a creditor upon this estate, rather than to take it as a purchaser, but we contend

that he took an absolute conveyance of the entire interest, and that this was not an advance for purposes of salvage. This is not like the case of a person purchasing up a subsisting incumbrance, but of a purchaser who has paid up the rent to the head landlord. When the rent is once paid it is gone completely. Even a mortgage with notice of a prior incumbrance to his own cannot obtain priority by purchasing in a mortgage prior to such incumbrance; *Toulmin v. Steere*; (a) *Parry v. Wright*(b). The principle contended for by the defendant, if established, would enable a party by a collusive sale to squeeze out all his creditors. The parties never contemplated this as a lien, but recite that the payment was prior to the execution of the deed, and the words of the recital show that it was made "in satisfaction and discharge of the said rent which *was* so due and owing by the said *Peter Roe*"—subject to one moiety of the renewal fines and to a due proportion of the rent.

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ROE.

Mr. Sergeant *Warren*, Mr. *T. B. C. Smith*, Q. C. and Mr. *Molyneux* for the defendant.

The defendant was not a purchaser of the lands; he only paid off the head-rent. This is called a purchase, but there has been no merger or change of the rights of the parties. The defendant is only a surety, and shall a surety be damaged because he gets the security from the principal in order to make the property more valuable? The payment has been a satisfaction of the rent, but

(a) 3 Mer. 210.

(b) 1 S. & S. 369, affirmed on appeal, 5 Russ. 139.

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not an exoneration of the debtor. Independently of the deed of conveyance, the testator by the express terms of his will, fixed the proportion of the rent payable by *Charles Roe*; and *George*, having paid for *Charles* the sum due in respect of the rent to which he was entitled, the effect of that payment was to create a lien upon *Charles'* share. So a mortgagee who pays off head-rents is entitled to charge such payment upon the estate; *Hamilton v. Denny*(a); *Toulmin v. Steere*(b), which is commented on by Lord Chancellor *Sugden* in *Gregg v. Arrott*(c). The view for which we contend is supported by *Mochatta v. Murgatroyd*(d) and *Kennedy v. Daly*(e).

COURT.—Declare the defendant *George Roe* is to be considered a purchaser of the portion of the lands of *Drimard* comprised in the deed of conveyance bearing date the 29th day of May, 1834, in the pleadings and the said report mentioned, and that he is not entitled to be considered as a creditor in respect of the two several sums of £393 8s. 10½d. and £83 9s. 9d. in the said report mentioned or either of them. Let the said defendants or such of them as ought so to do, within months, to be computed from the date of this decree, pay the several sums reported due to the plaintiff and to *Peter Thomas Alley* in said report named,

(a) 1 Ball & B. 202.

(b) 3 Mer. 210.

(c) Ll. & Goo. temp. Sugden 247.

(d) 1 P. Wms. 395.

(e) 1 Sch. & Lef. 355.

together with the costs hereinafter decreed ; 1842.
or in default thereof, let the Chief or BARKER
Second Remembrancer proceed to sell v.
the freehold interest of and in the part of ROE.
the lands of *Drimard* in the county of
Tipperary, and the interest in the said
lands of *Dunamore*, in the *Queen's*
county, of which it appears by said
report the said *Charles Doe* was seized
as therein mentioned, or a competent
part thereof, and out of the produce of
the sale, let the sums reported to be due
to the plaintiff and the said *Peter Alley*,
and the costs hereinafter decreed be paid
according to their respective priorities.
Declared the plaintiff entitled to the costs
of the suit, including the costs of raising
a personal representative to the said
Charles Roe, and declare the defendant
Francis De Lisle who has been set up
by the plaintiff as such personal repre-
sentative entitled to his costs in the cause
against the plaintiff, who is to have the
same over, together with her own costs,
against the funds.

Mr. *William Smith*, for the plaintiff, moved on the *Tues. 14 June*
notes of the decree in this cause, without affidavit, that
a receiver might be appointed over the lands in the pleadings
mentioned. The fund is insufficient, and the plaintiff will
lose the rents accruing due before the sale directed by the
decree can be effected.

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PENNEFATHER, B.—It is contrary to the practice of this Court to appoint a receiver after a final decree^(a).

(a) The practice in the Court of *Chancery* is different, and an application will be granted to appoint a receiver in that Court, when there has been a decree for a sale of lands to discharge a mortgage debt and the fund is insufficient; *M'Gough v. Magee*, 1 Mol. 28 note. And if there be a receiver appointed in a prior cause, he will be extended at the instance of a plaintiff who, by obtaining a decree, shows his incumbrance to be a lien on the lands, *Dardis v. Dardis*.—Ib.

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EQUITY
EXCHEQUER.
Fri. 13th May,

FITZGERALD v. DALTON.

- *Semb.*—The assignee of a judgment may sue out execution upon it in his own name, when it has been revived and assigned since the revival, the execution reciting that special matter.
- MR. *Brereton* applied for an order to extend a receiver, in respect of a judgment, which had been revived on the 19th May, 1841, and had been assigned in April, 1842.
- The Court expressed a doubt whether the order could be made, unless there had first been a previous revival by the assignee in his own name.

Mr. *T. B. C. Smith*, Q. C. *amicus curiæ*, said, that he had ascertained the practice of all the Courts of law in this country to be, to issue execution on a judgment, if revived within a year, though the judgment had been assigned since the revival, without any revival by the assignee; but that practice had appeared so questionable to him that he had opposed a similar motion to the

present in the Rolls. The Master of the Rolls had made the order as prayed; but directed that proceedings should be stayed upon it in order to give the parties an opportunity of arguing the question upon a motion at law. The motion was not argued in the Court of law (*Queen's Bench*), having been discharged upon some fatality without argument.

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FITZGERALD
v.
DALTON.

The Court sent for the officer and conferred with him on the practice.

BRADY, C. B.—The officer has reported to us that the uniform practice of the Court, for many years, has been for the assignee of a judgment to sue out execution upon it in his own name, the execution reciting the special matter. We will grant a conditional order, so that the party may have an opportunity of showing cause against the conditional order if he pleases.

Conditional order granted.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN IRELAND,

IN TRINITY TERM, IN THE FIFTH YEAR OF THE REIGN OF
QUEEN VICTORIA.

1842.

EXCHEQUER
OF PLEAS.

Thu. May, 27.

Lessee ELLIS v. CRAWFORD.

When a party had originally come into possession of land by permission of *A.*, and had acknowledged *A.*'s title in 1804 and 1811, but had never paid any rent, in respect of the land, and had given no acknowledgment of *A.*'s title for more than twenty years from 1811; *Held*, that an ejectment by the representative of *A.* was barred after the 20th year.

EJECTMENT on the title, tried at the last assizes for the county of the town of *Drogheda*, before Mr. Justice *Perrin*. Previously to 1804, the possession of a garden and certain premises in *Drogheda* had been given to the defendant's father, the Rev. Mr. *Crawford*, master of the Diocesan School of *Drogheda*, by Mr. *Ward*, under whom the lessor of the plaintiff derived his title. It was alleged on the part of the plaintiff that this possession had been given to the Rev. Mr. *Crawford* merely as a care-taker, and a letter from him to Mr. *Ward*'s agent, dated in 1804, was relied on, in which he stated that "he never had any interest in the premises," and disclaimed any intention of holding them adversely to Mr. *Ward*. It appeared that the Rev. Mr. *Crawford* had taken care of the garden and cultivated it for his own use, and had repaired the gate and the wall of it, but

there was no evidence of his having taken care of it after 1811. The plaintiff's counsel also relied upon a letter of 1811, also written by the Rev. Mr. *Crawford* to the agent of Mr. *Ward*, in which he acknowledged the right of Mr. *Ward's* representative to the premises. There was no evidence of any payment of rent in respect of them. The learned Judge thought that there was no case to be sent to the jury, the lessor of the plaintiff not having been in possession for more than twenty years, and he non-suited the plaintiff.

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v.
CRAWFORD

Tomb, Q. C. and *R. Holmes* now moved that the non-suit be set aside, and that a new trial might be had. Here was a possession confessedly originating in a permission on the part of those under whom the lessor of the plaintiff derives; then we have the two letters of the defendant's father, from which it may be inferred that he held these premises for the use, and as the servant of those from whom the lessor of the plaintiff derives his title. The Judge drew an unwarrantable conclusion; he should have sent the case to the jury upon the question of adverse possession. It is plain that the defendant's father having never paid rent, or established a title under the old law as it stood before 3 & 4 Wm. IV. c. 27, by not paying rent for more than twenty years, had not set his landlord at defiance; and as the tenant's possession was not adverse *ab initio*, so there is no evidence that it ever became so. The improvements made by the Rev. Mr. *Crawford* were for the landlord's benefit. *Doe v. Murrell(a)*; *Doe v. Williams(b)*; *Doe v. Rees(c)*; *Doe v. Jauncey(d)*.

(a) 8 C. & P. (b) 7 C. & P. 332. (c) 6 C. & P. 610. (d) 8 C. & P. 99.

1842.
 ELLIS
 v.
 CRAWFORD. [PENNEFATHER, B.—This was the very kind of possession in the defendant which the late statute turned into an adverse possession. The parties were not in the relative situation of employer and employee.]

Napier, contra.—There was nothing to send to the jury, for the statute 3 & 4 Wm. IV. c. 27, was plainly a bar.

PENNEFATHER, B.—We think there was nothing in this case to send to the jury. The time specified by the Statute of Limitations of Wm. IV. for bringing the ejectment, had passed.

Rule refused(a).

(a) See *Jack, lessee of Montmorency v. Walsh*, 4, Ir. L. R. 254.

1842.
 EXCHEQUER
 OF PLEAS.
 27th May.

ALCORN v. LARKIN.

AN entry of the ASSUMPSIT for goods sold, &c. Pleas, general issue and the Statute of Limitations. At the trial before the Lord Chief Baron, at the sittings after last *Easter* Term, the defendant was unable to sustain his plea of the Statute of Limitations, but relied upon a decree of the Assistant-Barrister of the county of *Galway* of the 28th October, 1837, for £9 9s. 9d. obtained by the plaintiff

the signature of the assistant barrister. A notice served at 12 o'clock the day previous to a trial at nisi prius in *Dublin*, to produce a document in evidence, is too late.

against the defendant in respect of the same demand. This decree he had not to produce, but he proved service upon the plaintiff of a notice to produce it, which notice had been served between 11 & 12 o'clock on the day previous to the trial. The plaintiff refused to produce it. The defendant then produced the clerk of the peace of the county of *Galway*, who produced his book with an entry therein of a decree in a case between the plaintiff and defendant, for the plaintiff, for £9 9s. 9d. and proved a private mark of his own, namely, the letter "I" opposite to the entry, which he swore he was in the habit of annexing to the entries of those cases in which decrees issued, but he could not say that the Assistant-Barrister signed the decree. The book was not signed by the Barrister. The plaintiff resided in the City of *Dublin*, and so did his attorney. Upon this evidence two points were raised :—

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ALCORN
v.
LARKIN.

First.—Whether the entry in the book of the clerk of the peace was primary evidence ; and—

Secondly.—Supposing it not to be so, was the notice to produce the primary evidence served in sufficient time to let in the secondary evidence.

The jury, under the directions of the Lord Chief Baron, found a verdict for the plaintiff, which *Keogh* now moved to set aside and to enter a verdict for the defendant.

Keogh, for the defendant.—We gave 24 hours notice to produce the decree, and that was sufficient. It was reasonable to serve the notice on the plaintiff's attorney,

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v.
LARKIN.

as the decree must have been in the possession of the plaintiff, or of the plaintiff's attorney, for it was the officer's duty to issue it, and the Court will take judicial cognizance that it was so; therefore, it must be presumed that the decree issued in proper form.

(Mr. *Freeman*, the Assistant Barrister of the county of *Galway*, came into court, and in reply to a question from the Court, stated, that invariably he signed his civil bill decrees for the clerk of the peace, on the faith of the signature of the clerk of the peace in the book.)

But even if our notice were not in time, we have given the best evidence of the decree of the inferior Court by producing the book itself in which it is entered.—*Rosc. Ev.* 80. The 36 Geo. III. c. 25, s. 18, directs these books to be kept by the clerk of the peace. It must be presumed that all the proceedings were properly taken and regular. If so, a judgment of the inferior Courts will operate as a bar to the plaintiff's action, being a former recovery of the same demand. 1 *Stark. Ev.* 228; 2 *Phillipps, Ev.* 510; *Duchess of Kingston's case*(a).

Mac Donough, contra.—The merits of the case are admitted to be with the plaintiff; there is no pretence that the amount of the civil bill decree was ever paid. But the notice is too late; we should have had three or four days notice to enable us to send for it to the country, *Rex v. Ellicho* (b); *Doe v. Gray* (c). [PENNEFATHER, B.—There is a distinction between this case and that of

(a) 20 How. St. Tr. 612.

(b) 5 C. & P. 522.

(c) 1 Stark, Rep. 283.

Doe v. Gray, for a notice to produce a lease does not dispense with the production of the attesting witness, but here there is no attesting witness]. But we could not know from the pleadings that the defendant would make this defence, and we were taken by surprise. The presumption is that the decree was left with the local attorney in the country for execution: the name of the attorney for the plaintiff in the book of the clerk of the peace is not that of the attorney for the plaintiff in this action.

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v.
LARKIN.

Next, supposing the notice to be too late, the book is not sufficient evidence of the decree. The clerk of the peace could not swear that the decree was signed by the Assistant Barrister; besides, it has been said by Lord *Tenterden* that a judgment in assumpsit cannot be received in evidence unless payment or satisfaction under it could be shown; *Smith v. Welton*(a). In *Pickram v. Gaskin*(b), it is decided that when a defendant justifies under a civil bill decree it is sufficient to aver that the defendant below resided within the division of the county in which the cause was heard, without showing that proof of such residence was made before the Assistant Barrister, but here they have not shown that the defendant was at all resident within the jurisdiction of the Civil Bill Court at the time. They should have given evidence of the issuing of the process, and of the residence of the defendant within the county of *Galway*, but they have begun *inverso ordine*, with a decree. This decree was never renewed, and there was no decree subsisting which could be enforced at the time of the trial; *Plummer v. Woodhouse*(c). The

(a) 1 Ch. Pl. 513.

(b) 2 Hud. & B. 247.

(c) 4 B. & C. 625.

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decree may have been reversed. Two things are essential to the validity of a civil bill decree ; 1st, the addition of the defendant, by 31 Geo. III. c. 31 ; and 2nd, signature by the Assistant Barrister, by 6 & 7 Wm. IV. c. 35, neither of which is contained in this book, so that it cannot be received as primary evidence.

Keogh, in reply.—Had the decree been appealed from, the word “ appeal ” must have been entered in the book. [PENNEFATHER, B.—An appeal might have been lodged with the sheriff]. But if the decree had been reversed on appeal, the word “ Reversed ” would have been written in the book at the assizes. We produce the book only as a secondary evidence of a fact, namely, that a decree was pronounced, and it must be taken that the decree was regular. *Briscoe v. Stephens*(a).

PENNEFATHER, B.—If you rely upon the notice, and offer the book as secondary evidence, the notice is not in time ; and if you rely upon the book as primary evidence, it wants the requisites of a decree, and is therefore void.

Rule refused with costs(b).

(a) Napier by Longfield, 38. 9, B. Moo. 413.

(b) This case is not to be considered as an authority on the point of notice ; as from many cases it would seem the notice was in quite sufficient time. These cases were not cited for the defendant. See *Arkins v. Meredith*, 4, D. P. C. 658, *per Gurney, B.* ; *Gibbons v. Powell*, 9, C. & P. 634.

Lessee **ACHESON v. JACKSON.**

1842.

EXCHEQUER
OF PLEAS.
Fri. 28th May.

EJECTMENT. There had been judgment for the plaintiff, and *habere* executed in Nov. 1841, by which the defendant was evicted from the premises where she resided. The defendant, *Mary Jackson*, upon being so dispossessed, went to reside at the house of her sister Mrs. *Gray*, where she continued from thenceforth to reside. In March, 1842, an execution issued, in the name of the feigned lessee, against the defendant, for the sum of £93, for the amount of the costs of the ejectment; and a warrant was given to a bailiff to arrest her. On the morning of the 7th March, 1842, four bailiffs proceeded to Mrs. *Gray's* house for the purpose of arresting the defendant; and it appeared by the affidavit of one of them, that they saw the outer door of the house hastily closed as they approached; that the deponent had demanded admission from Mrs. *Gray*, who appeared at one of the windows, and stated that he had received information that the defendant was in the house, and was concealed there to avoid arrest. Mrs. *Gray* refused them admittance, denying that the defendant was in the house. The bailiffs proceeded to the back door, which they found imperfectly bolted, and which they opened, but without breaking it. They then broke open an inner door, and having found the defendant in the house, took her to prison.

Where a defendant who had been evicted from her own residence in Nov. went to reside with her sister, with whom she continued until March, when an execution issued to arrest her, and she was concealed in her sister's house from the bailiffs.

Held, that the defendant was not to be considered as having fled to her sister's house for the fraudulent purpose of defeating the execution.

A bailiff has no right to open an outer door of a house to arrest one of its inmates on a *ca. sa.* A person *bonâ fide* residing with a family was held entitled to the protection of the house from such arrest. The defendant was held entitled to the costs of the motion for her discharge.

Fitzgibbon, Q. C., now moved that the prisoner be discharged from custody, the arrest having been contrary to law. If she had gone fraudulently to conceal herself

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v.
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in the house, the bailiffs might have followed her. *Semayne's Case*(a); but she was lawfully residing in the house of her sister when the door was opened. If a man be residing in the house of another, it is his castle for the purpose of protecting him from arrest. If a party be arrested by breaking an outer door, the Court will discharge him upon a summary application. *Hodgson v. Towning*(b). Though the door was not broken, this is a forcible entry. Lifting a latch has been so held. [PENNEFATHER, B.—There is no doubt of that.] Then the only question is, was the defendant not entitled to the protection of the house? If so, she must be discharged.

Armstrong, Q. C. & R. Chambers Walker, contra.—This does not come within the rule in *Semayne's Case*, for the house wherein the defendant was arrested, was not her own, and the whole was “fraud and covin,” within the meaning of the resolution in that case. The defendant must have known that she was liable to these costs, and this fact, coupled with the denial of her being in the house, made by her sister to the bailiffs, shows that the defendant was there for the purpose of evading arrest. [PENNEFATHER, B.—If a person be turned out of his house, as in this case, by legal process, and in six months after is arrested, that cannot be considered as flying from process of law.] The parties were well aware that the bailiffs intended to justify this arrest on the ground of the house being used by the defendant for the purpose of concealment.

(a) 5 Co. 95.

(b) 5 D. P. C. 410.

BRADY, C. B.—We are all of opinion that this person must be discharged. The authorities referred to appear, from an early period, to have laid down, that the house of any one is a castle for himself and his family, though it does not extend to protect any person who flies to his house for fraudulent purposes, to defeat the execution of law. That is the resolution in *Semayne's Case*, interpreted by Justice Foster, thus^(a)—"It must
 " likewise be confined to a breach of the house in order
 " to arrest the *occupier or any of his family* who have
 " their domicile, their ordinary residence there; for if
 " a stranger, whose ordinary residence is elsewhere, upon
 " a pursuit taketh refuge in the house of another, this is
 " not *his* castle; he cannot claim the benefit of sanctuary
 " in it." That is very clearly and properly defined. There is nothing for which the law has greater regard than the security of the outer door of a man's house; and it is not to be broken open on light grounds. In the absence of an authority, there is nothing to lead us to alter that principle in such a case as this. The defendant was ejected several months ago, and after having been so ejected, she resided where it may naturally be supposed she would reside, in the house of her sister; and it would be a strong thing to hold this to have been from the beginning merely a colorable transaction. Upon these grounds, and without saying what would have been the case if the outer door had not been broken open, we therefore think the defendant must be discharged. We do not think it a case in which she should be allowed to bring another action; but she must have her costs.

1842.
 ACHESON
 v.
 JACKSON.

(a) Foster, C. L. 320.

1841. *Fitzgibbon*.—The defendant consulted counsel respecting
 { ACHESON the propriety of this motion, and she ought to be allowed
 v. the costs of doing so.
 JACKSON.

Per Cur.—We think the officer should allow these costs in his taxation.

Armstrong.—The costs of the defendant should be set off against the costs of the ejectment.

BRADY, C. B.—We think the parties ought to be placed in *statu quo*.

Motion granted with costs.

1842.
 { EQUITY
 EXCHEQUER.
 Wednesday,
 1st June.

PHELAN v. RUSSELL.

Where there is a bequest of money in trust for a charitable use, and the trustee dies before the trust is executed, the disposition of the property belongs to the Crown, under the sign manual.

MARY Mahon, being possessed of certain stock and money vested in different securities, by her will, dated the 26th September, 1818, gave and bequeathed all her personal estate to *William Russell*, in trust for the payment of certain legacies and debts; and subject thereto, she gave and bequeathed the residue of her personal estate to the said *William Russell*, (whom she also appointed her executor,) in the following words—"I give and bequeath the residue of my personal estate, after payment of the said legacies and debts, to my said executor, *William Russell*, to be by him applied for such pious purposes and uses, as shall appear to him to be most conducive to the honour and glory of God, and the salvation of my soul."

The bill was filed in 1825, by the legatees of *Mary Mahon*, and prayed an account of her personal estate, and payment of her legacies. There had been a sum of £4090, the residue of the property of the testatrix, in the hands of a person named *Mellish*, who had brought that sum into Court. A question was raised at the hearing in 1828, whether the bequest of the residue was void, as being a bequest to superstitious uses; but on the 25th June, 1831, a decretal order was pronounced in this cause, declaring the bequest of the residue to be a good charitable bequest, and ordering that it should be referred to the officer to approve of a proper scheme for bestowing it. A few days after the pronouncing of this decree *William Russell* died. The report found that the residue of the testatrix' property could not be better applied than to the benefit of her poor relations, (about 60 in number,) or, if not to them, that it would be properly given to *Barrington's Hospital*, in *Limerick*.

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The case was now argued by Mr. *Collins*, on behalf of the next of kin, and on the application of Mr. *Geo. Crawford* was ordered to stand over for the purpose of allowing the Attorney-General, on behalf of the Crown, to present a petition for a rehearing of this case, the Crown having claimed the right of disposing of the residue, under the sign manual.

The case was now reheard, and argued by—

Sat. 4th June.

The *Attorney-General* and Mr. *George Crawford*, for the Crown.

The person on whom the trust of applying this

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 RUSSELL.

residue was bestowed, died a few days after the decree, and at the moment when he ceased to exist, the disposition of the property was placed in the Crown, for it was a trust confined to the executor personally, and cannot be executed by any other person. *Hibbard v. Lamb*(a); *Downs v. Warrall*(b). Where the disposal of a bequest to pious uses has been left in a trustee, and the Court has not interfered, it has always been, because the trustee was alive, as in *Powerscourt v. Powerscourt*(c). Where a bequest is void as being for a superstitious use, but is good as a charity, the disposal of it rests with the Crown. *Da Costa v. De Pas*(d); the *King v. Lady Portarlington*(e). There is no person to execute the trust, though it may have been originally a good charitable gift, *Baker v. Sutton*(f). The Crown is now to dispose of it as if there had been no trustee, by sign manual. *Moggeridge v. Thackwell*(g); *Ommaney v. Butcher*(h).

Sergeant *Greene*.—Under a trust by will, for the benefit of a charity, the disposition must be by reference to the officer, but if a trustee be interposed, the Court will administer the trust through him. *Paice v. Archbishop of Canterbury*(i); *Moggeridge v. Thackwell*(j); *Attorney-General v. Syderfin*(k); *Pieschel v. Paris*(l).

Mr. *Collins*, Q. C. and Mr. *Hobart*, for the plaintiff, one of the next of kin. There was a trust created by the will, which the Court has by its decree declared to be a valid bequest;—the trustee indeed is dead, but the remem-

(a) 1 Ambl. 390.

(d) Am. 228.

(g) 7 Ves. 36.

(j) 7 Ves. 36.

(b) 1 Myl. & K. 561.

(e) Salk. 162.

(h) Turn. & Rus. 260.

(k) 1 Vern. 224.

(c) 1 Molloy, 616

(f) 1 Keen. 224.

(i) 14 Ves. 364.

(l) 2 S. & S. 384.

brancer has approved of a scheme for giving the fund to the next of kin, and the Court will now execute that trust, and as we submit, should do so in favour of the next of kin. The *King v. Lady Portarlington* (a); *Attorney-General v. Syderfin* (b); *Attorney-General v. Harrick* (c).

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 v.
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PENNEFATHER, B.—The usual class of cases in which a trust fails, is that in which there is such uncertainty in the trust that the Court cannot administer it; now if the Court can use the discretion of the trustee, it will act through him; but if the trustee die without having executed the trust reposed in him, the Court cannot act. Our decree is made upon the ground that the trustee in this case is dead. We shall vary the former decree so far as relates to the Master approving of a scheme for disposing of the money, which must be done under the sign manual, and declare that the residue of the property of the testatrix belongs to the Crown. The costs of all parties must be paid out of the general fund.

(a) 1 Salk. 162. (b) 1 Vernon, 224. (c) Amb. 714.

COOPER v. KIRBY.

1842.
 EXCHEQUER
 OF PLEAS.
 Mon. 6th June.

WATSON moved that the writ of *capias*, and the subsequent proceedings in this case, might be set aside, on the ground of an alteration having been made in the direction of the writ, subsequently to its having been issued.

The alteration of a writ without resealing avoids it altogether. It is too late to object to the notice of a motion grounded on "an affida-

vit filed," when the date of the notice is prior to the date of the affidavit, if the party objecting has already answered the affidavit.

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COOPER
v.
KIRBY.

Mockler, contra—objected to the motion, inasmuch as the notice of motion was grounded on an affidavit *filed*. The date of the notice of motion was prior to that of the affidavit.

Watson.—The plaintiff has answered the affidavit, and his objection is now too late.

Of this opinion were the Court.

[BRADY, C. B.—We have examined the writ, and there is plainly an erasure in the county, to the sheriff of which it is directed.]

Watson.—This is only an irregularity, and did not render the writ a nullity. The practice is to issue the writs from the office in blank ; and therefore, the attorney having no object in altering it, there can be no imputation against the attorney. If an alteration took place, it took place in the office, after the return. In *England* it is every day's practice to alter and reseal writs. *Durden v. Hammond*(a). Besides the defendant has made no affidavit of merits.

BRADY, C. B.—If we were to countenance the practice of altering writs in this country, the revenue would be defrauded of the lawful stamp on each writ. We disapprove of the practice of issuing writs in blank, and will direct that none shall be so issued in future. An affidavit of merits was not necessary here, as this was not a mere irregularity ; the proceedings were void altogether.

(a) 1 B. & C. 111.

PENNEFATHER, B.—The case cited in argument shows that a writ may be altered and resealed at any time previously to the day when it would have originally been returnable. In the case before the Court there has been no resealing, and as the Chief Baron has observed, it appears from the affidavits in the case, that the defendant has not been served with a copy of the writ now in question, the name of the county having been different in the writ and in the copy served.

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v.
KIRBY.

Motion granted with costs.

The Court having sent for the officer, directed that no writs should issue in blank in future.

In the matter of WILLIAM FRY.

EXCHEQUER
OF PLEAS.
Sat. 11th June.

EDWARD PENNEFATHER applied on behalf of Mr. *William Fry*, who had been apprenticed to a Mr. *William Barlow*, a solicitor of this Court, that the officer might be directed to enroll his indentures of apprenticeship *nunc pro tunc*, under the following circumstances:—It appeared from the affidavit of Mr. *Fry* and his father, that the latter gentleman was an officer in the Artillery, and that he presented his memorial for the purpose of having his son bound apprentice to Mr. *Barlow* who was the solicitor for the Ordnance. That the prayer of the memorial being granted, Mr. *Fry*, the elder, remitted to Mr. *Barlow* £100 to pay for the stamps upon the indentures of his son; that the indentures were executed on the 28th April, 1840, but through the neglect of the solicitor, the stamp

Where the stamp duties on the indentures of an attorney's apprentice were not paid at the time when the indentures were executed, though money had been previously sent to the attorney, the Court refused to direct the indentures to be enrolled *nunc pro tunc*, though the duties and penalty had been paid subsequently.

1842.

In re FRY.

duty was not paid upon the indenture of apprenticeship, until the time allowed for stamping without incurring a penalty was passed, and that the solicitor having paid the stamp duty and penalty, the indenture was taken to the officer to be enrolled ; but he refused to enroll them, inasmuch as the term next after the execution had elapsed.

E. Pennefather.—I have discovered upon the files of the Court, two affidavits made in a similar case, and have the order made therein, which shows that in that case the Court has gone even farther than it is required to do in this instance, that was in the matter of *John Parsons*, 22nd June, 1838. The Court ordered that the indenture of an attorney's apprentice should be enrolled as of the date thereof, where through neglect or inadvertency the stamp duty was not paid when the indentures were executed, nor till after the five years of apprenticeship had elapsed ; but the Court ordered that the indenture of apprenticeship might be stamped and might be enrolled as of the date thereof. Also in *Anonymous(a)*, it is laid down that the Court will permit the indenture of an attorney's apprentice to be enrolled *nunc pro tunc*, when on the report of the examiner it appears that the omission was on the part of a third person. The father here was a military officer, and the son a boy ; they were both totally unacquainted with legal business, and confided in the solicitor who had been appointed by the government to the situation of solicitor to the Ordnance. They ought not to be made to suffer from his default. I am informed that it is the usual practice not to have the indentures stamped until they are executed.

(a) 3 L. R. N. S. 140.

BRADY, C. B.—The danger is that no stamp duty will ever be paid if we allow this motion. Except in the single case of *Mr. Parsons* this Court has invariably held, that the stamp duty must be paid, and that the indenture can only be enrolled from the time when the stamp duty is paid.

1842.
In re FRY.

PENNEFATHER, B.—*Mr. Barlow* does not state when he received the money, nor does the father of the applicant state when he sent it to *Mr. Barlow*. It may be that the money never was paid to *Mr. Barlow* at all. We cannot say that the parent of this young man, or the young man himself has been altogether free from negligence. The stamp duties ought to have been paid when the indentures were executed. Apprentices have an easy way of ascertaining that they are not defrauded, by seeing that the stamp duties are paid before the indentures are signed. There is really no hardship in the case: the indentures ought not to be executed unless they are previously stamped. I say nothing of what the practice is; but I mention this publicly, that it may be known what it is proper to do.

LEFROY, B.—It was most reprehensible conduct of the solicitor to keep this money in his pocket for two years. It will be for the father to consider whether he will make an application against him here, or to the Benchers.

Motion refused.

1842.

HAYDEN v. BARTON.

EXCHEQUER
OF PLEAS.

Mon. 13th June.

A sheriff having levied, by a sale by auction, the amount of an execution, the sub-sheriff retained out of the produce of the sale, a sum for the auctioneer's fees, which sum he did not pay over to the auctioneer, but retained in his own pocket. The sale took place on 23rd May, 1841. The Court did not consider the plaintiff guilty of laches in not applying before June, 1842, to have this money paid over, and, under the circumstances, ordered it to be paid within a month.

This Court has jurisdiction to make sheriffs refund fees illegally exacted.

THE plaintiff in this case had obtained a judgment in assumpsit against the defendant, on which a *fi. fa.* marked for £504 issued, which was lodged in the hands of the sheriff of the county of *Kilkenny* for execution. On 23rd May, 1841, the sub-sheriff proceeded to sell the property of the defendant by auction; and at the sale announced, that the purchasers would be obliged to pay 1s. in the pound for auctioneer's fees; to which the plaintiff did not at that time object. The sale took place, and a sum of £700 was thereby raised; but a previous execution was to be first discharged thereout, and the balance was not sufficient to cover the plaintiff's demand. The sub-sheriff deducted, for the auctioneer's fees, a sum of £33 6s. 8d. from the amount paid to the plaintiff; he did not however, hand over the fees to the auctioneer, but retained them, as he alleged, to meet the expenses of taking surveys of the defendant's land, of posting notices, of keeper's fees, &c.

Macdonough and *James A. Wall*, for the plaintiff, applied for an order, that the sheriff of the county of *Kilkenny* should amend his return to the writ of *fi. fa.* or that he should pay over to the plaintiff the said sum of £33 6s. 8d. This was mere extortion. It is established law that auctioneer's fees cannot be charged upon the produce of a sheriff's sale, except by consent of the

parties; but the sub-sheriff who levied this amount has not paid over the money to the auctioneer; he has retained it in his own pocket.

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v.
BARTON.

Bennett, Q. C. and V. Scully for the sub-sheriff.—The Court has no jurisdiction to decide the question upon motion. It is only under the statute 6 Anne, c. 7, that a person aggrieved by exaction of illegal fees can proceed against the sheriff, who is thereby made liable to a penalty of £20 or treble damages; that is the only remedy of the party aggrieved; *Lofft's Reports*, 372. [PENNEFATHER, B.—There are cases in which the Court will leave the party to his action, but not on the ground of want of jurisdiction.] A summary jurisdiction has been conferred upon the Courts by the 7 Wm. IV. and 1 Vic. c. 55, which regulates the fees of sheriffs in *England*; but this Court will not, even if it have jurisdiction, now decide this case upon a summary application after the lapse of more than a year from the time when the levy was made. The application should be made within a reasonable time. *The King v. Sheriffs of London*(a). The Court has held that the lapse of two terms and a long vacation was too much; *the King v. Sheriff of Surrey*(b); *Clutterbuck v. Jones*(c); *the King v. Sheriffs of Middlesex*(d); *Benyon v. Garrat*(e); *Stephens v. Rothwell*(f). There are cases in which the sheriff might be entitled to retain something beyond his poundage. In *Ramsay v. Tufnell*(g), it was held that the expenses of execution include the expenses of levying. Besides

(a) 1 Taunt. 111.

(c) 15 East, 78.

(e) 1 C. & P. 154.

(b) 7 T. R. 452.

(d) 1 D. P. C. 53.

(f) 6 B. Moo. 338.

(g) 2 Bing. 255.

1842.
HAYDEN
v.
BARTON.

the plaintiff assented to the auctioneer's fees being retained at the sale. A great many expenses were incurred, for which the sum claimed is not in fact sufficient to remunerate the plaintiff.

J. A. Wall, in reply.—The sub-sheriff had no right to retain this money. *The King v. Fitzgerald*(a). There has been no laches which can effect the substantial justice of the case; and the utmost effect of the plaintiff's laches would be to deprive him of the costs of this motion. The sheriff had clearly no right to more than his poundage, except by the assent of the parties; and though in the case of mere irregularity laches may be taken into consideration, it should not be so in the case of void proceedings. It is quite consistent with the practice of the Court that the sheriff should be directed to amend his return, though good upon the face of it. *Reynolds v. Tresham*(b).

BRADY, C. B.—It is an admitted fact that the sub-sheriff got five per cent for auctioneer's fees, and he himself says, that he has not applied the money to that purpose; we are only called on to order him to pay money which he confessedly has in his pocket, to the party entitled to it. Upon the whole of the case we think the sheriff is bound to repay this sum. The Court has always exercised a jurisdiction to fine sheriffs for neglect of duty, and we have no doubt of our jurisdiction to make the order we are called on to make, that the money in question shall be paid back. The lapse of time however, forms an important element in this case,

(a) 1 Jones, 35.

(b) 6 L. R. N. S. 138.

and taking it into consideration, I think the party upon whom the order is made should not be obliged to pay costs.

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v.
BARTON.

PENNEFATHER, B.—It has never been seriously questioned that a superior Court has jurisdiction in such a case as this, and such jurisdiction is not only unquestionable, but also very beneficial. I cannot say that the argument raised any doubt in my mind upon this point. But it is said, that after the time that has elapsed we ought not to interfere. Unquestionably parties ought to come forward in matters of this kind while they are yet recent, and when the facts are fresh in their recollection; besides, a public officer ought to be discharged as soon as possible from liability in respect of his office. But when there is no doubt of the question in point of law, it would be going too far to say that we ought not now to interfere. We have been referred to the late *English* statute, by which it is said we ought to be guided, and to be bound by the limitations of time pointed out in it; but the second section of that Act provides for dealing with defaulters criminally. It may be very right to restrict the time for taking criminal proceedings to the time limited by that Act; and it may be a question, whether a party could have any other remedy in *England*, after that Act passed. But it does not appear to us that we are restricted to this period, and we shall order the sheriff to repay this money within a month.

RICHARDS, B.—If the sheriff had paid over the money to the auctioneer, perhaps we could not interfere; but he admits that he has the money in his pocket.

LEFROY, B.—Concurred.

Motion granted.

The first of these was the establishment of the

city of Boston in 1630, when a group of

settlers from England arrived in the

area and founded the city of Boston.

The second was the establishment of the

city of Boston in 1630, when a group of

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The third was the establishment of the

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AN
INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ACCOUNT.

1. Where A. was indebted to B. and other creditors, and offered a composition to be paid "by cash or good endorsements," to which B. assented, and an endorsement for part of the composition and cash for the balance were tendered and refused; B. then brought *indebit assumpsit*, without any special count, for the whole debt. *Held*, that B. could not recover the amount of the composition on a count on an account stated. *Moran v. Armstrong*. P. 80
2. A sequestrator will be ordered to account before the officer of the Court of Exchequer, though he had already accounted before the officer of the Bishop's Court. *Garston v. Williams*. Page 168
3. Where several sequestrations have been obtained in different causes against a defendant, and an order obtained in one of the causes that the sequestrator, who was sequestrator in all the causes, should account, and the sequestrator offered to pass a consolidated account in all the causes, the officer of this Court was ordered to take the account, for which the order was obtained, having regard to the accounts in the other causes, which should be taken as proper accounts, with liberty to the defendant to surcharge and falsify. *Ib.*
3. An account was decreed against an executor after a lapse of nine years, notwithstanding an account totted by a mutual friend of the plaintiff's and the the defendant, and admitted by the plaintiff in 1833, but not then examined by them or vouched by the defendant. Such account is perfectly inoperative against minors claiming under the testator's will. *Purcell v. Cole*. Page 449

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ACT OF BANKRUPTCY.

1. Seizure after. Trover lies by the assignee of a bankrupt against a creditor by judgment on a warrant of attorney to whom a sheriff has paid over the proceeds of a sale of goods of the plaintiff, seized prior to the act of bankruptcy, under a writ of execution on such judgment, and sold after the act of bankruptcy, without notice to the sheriff or execution creditor of such act of bankruptcy. (RICHARDS, B. *dissentiente*.) *Hudson*, assignee of *Henry v. M^r.Allen*. Page 299

ACTION.

1. Liability to a civil action is not an interest to disqualify a witness. *Gillespie v. Cumming*. Page 181
See EVIDENCE, 5.
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ADMISSION.

1. Where in an affidavit by the respondent in a petition matter for a receiver on a judgment, he denied that the sum claimed by the petitioner was due, but said that the "entire sum due on foot of the judgment, &c. is £474 8s. besides costs which this deponent is advised that he is not liable to,"—it was held that he was thereby precluded from insisting on the statute of limitations as a bar

to the full amount of that sum. *Tristram v. Harte*. Page 186

2. Per FOSTER, B. This affidavit was a sufficient acknowledgment in writing to take the case out of the statute of limitations. *Ibid*.

ADVERSE POSSESSION.

1. Where A., a tenant in common, had been in exclusive possession of the rents of S. for more than 25 years, and an ejectment had been brought by another co-tenant in common, to which A. had taken defence, and on which no further proceedings were taken, such defence is not conclusive evidence of adverse possession against A's co-tenant in common. *O'Sullivan (Lessee) v. M^r.Swiney*. Page 111
2. K. died in 1791, possessed of an equity of redemption in the lands of A. held for a term of years under the see of *Down*, and left two sons H. and T. H. thereupon entered into possession of the lands of A., and obtained renewals of the lease thereof in his own name; he also executed mortgages thereof, applied the rents thereof in discharge of some of his father's debts, and acted as sole owner thereof until his death in 1809. He obtained letters of administration to his father, in 1802; no claim was set up by T. during the life of H. to these lands. *Held*, that such possession was not adverse against the representatives of T. *Scott v. Knox*. Page 381

AMENDMENT,

1. It is not of course to permit the amendment of pleas before demurrer taken. *Sims v. Thomas.*

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2. Where in an action of debt on an English judgment, the defendant pleaded, 1st. *nil debet*, and 2ndly. and 3rdly. that the judgment in debt had been recovered by the plaintiff on a bond conditioned for the payment of an annuity, and that by the statute 53 Geo. III., c. 141, the bond was void, no memorial of the same having been enrolled, pursuant to the provisions of that Act; the Court refused to allow the 2nd and 3rd pleas to be amended. *Ibid.*

3. In the same case the Court, however, refused to rescind the rule for pleading several matters, and to strike out these pleas. *Ib.*

4. Where a defendant was sued on a bond conditioned for the performance by a third person, of covenants, (some of which were negative) and pleaded generally performance of the covenants, and the plaintiff demurred specially to such plea, the Court permitted the defendant to amend his plea, and to plead specially performance of the negative covenants. *Johnson v. O'Hagan.*

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5. Of notes of a decree after appeal,

See APPEAL.

REHEARING.

APPEAL.

Where it is sought to amend the notes of a decree, after appeal, the appellant may be allowed to present a petition for a rehearing of the cause, without withdrawing his appeal.—*Galwey v. Barron.* Page 77

ARBITRATION.

See AWARD.

ARREST.

1. Privilege of a witness,
See WITNESS, 3.
2. Privilege of an attorney from arrest,
See ATTORNEY, 2, 3.
3. Where a defendant, who had been evicted from her own residence in *November*, went to reside with her sister, where she continued until *March*, when an execution issued to arrest her, and she was concealed in her sister's house from the bailiffs. *Held*, that the defendant was not to be considered as having fled to her sister's house for the fraudulent purpose of defeating the execution. *Lessee Acheson v. Jackson.* Page 670
3. A bailiff has no right to open an outer door of a house for the purpose of arresting one of its inmates on a *ca. sa.* *Ibid.*
4. A person *bona fide* residing with a family, is entitled to the protection of the house from such arrest. *Ib.*

ARREST OF JUDGMENT.

1. A declaration in *indeb. assum.* was entitled generally as of Easter Term,

1840, and stated that the defendant *heretofore*, to wit on the 31st Oct., 1840, was indebted, &c. The jury found for the plaintiff. *Held*, that the Court will presume the judge at *Nisi Prius* to have directed the jury properly, and to have excluded from their consideration any cause of action not accrued before the declaration was filed, and a motion in arrest of judgment was refused.

Taylor v. White. Page 504

See PRACTICE, (LAW,) 1, 2, 5.

ASSUMPSIT.

1. A promise by a widow to pay a debt incurred by her husband and herself during coverture, is not a sufficient consideration to maintain an action of assumpsit, the fact of her having had separate property not appearing on the pleadings.

Ferrers v. Costello. Page 292

2. A. contracted to take a house from T., for five years, at a certain rent, "above taxes," and to expend £20 on the house, and to deliver up the premises in as good order and condition as she had received them. A., on giving up the house, left some taxes unpaid. B. having taken the house, was obliged to pay the arrear of taxes due by A., and was given credit for the amount by the landlord, T., in the rent. T. brought an action of assumpsit for breach of contract. *Held*, that he might recover the amount so allowed in B.'s rent on the money counts.

Thorpe v. Heron. Page 333

3. The *Hibernian Gas Company* having supplied gas to an hotel, of which M. & L. were proprietors, for the price of which gas M. & L. were indebted to the Gas Company, the defendant, who was the receiver of the profits of the hotel for M. & L., gave an undertaking to the Gas Company, as such receiver, and with the sanction of M. & L., that the sum so due should be paid within six months from the date thereof; and also undertook that the future supply of gas to the above concern should be discharged by him (the defendant) as it should become due, until further notice. *Held*, on demurrer, that a sufficient consideration of forbearance to sue appeared on the face of the undertaking to entitle the Gas Company to maintain assumpsit. *Hibernian Gas Light Company v. Parry.*

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See PLEADING, 7.

GUARANTEE.

ATTORNEY.

1. Notice to elect.—Where the attorney of the lessor died after verdict, and the defendant, without serving the lessor of the plaintiff with notice to elect an attorney, issued an attachment against the lessor of the plaintiff for the costs, the attachment was set aside, with costs. Lessee *Lawless v. Walsh.*

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2. An attorney who has gone the circuit of the quarter sessions, is not

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entitled to be discharged from arrest under a *ca. sa.* upon an affidavit stating that he was engaged as attorney for a traverser in a certain case on the criminal side of the court of quarter sessions, and that he was going in the direction of the court, which was then sitting, when he was arrested. *Scott v. Frayne.*

Page 487

3. *Semb.* The 65th and 68th sections of the 56 Geo. III. c. 56, do not apply to an attorney practising on the criminal side of the court of quarter sessions. *Ibid.*
4. The court will not, on motion, refuse to allow the usual fees payable on the swearing in attorneys to the secondary, the tipstaff, and the deputy crier. *In re Ince.* Page 584
5. The Court will not exercise its discretion in relaxing the rule prescribed by the statute concerning the period of an attorney's apprenticeship, where the apprentice has been incapacitated by illness from serving five of the twenty terms, though it was sworn that he had attended his master's office for three years before he was bound, and his master had consented to his being now sworn, *In re Dease.* Page 654
6. *Semble,* the Court will not take notice in such cases of the applicant's family affairs, except where a father has been an attorney, and there is danger of the business of the office being lost to his family. *Ibid.*
7. Where the stamp duties on the indentures of an attorney's appren-

tice were not paid at the time when the indentures were executed, though money to pay them had been previously sent to the attorney, the Court refused to direct the indentures to be enrolled *nunc pro tunc*, though the duties and penalty had been paid subsequently. *In re Fry.*

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AWARD.

1. Where B. evicted M., by title paramount, and an award was made on a submission to arbitration, "to declare what amount may be the profits to be derived by B. from the expenditure of M. with allowance for ditching and draining, as well as building and manure, so as to extend its benefits to any future crop;" and it was awarded that B. should give M. £107 for profit, calculated to accrue to B. from M.'s improvements, and that B. should give M. the use of the house he occupied, to a certain day, on which M. should give to B. *possession of the premises.*—*Held,* that this award was not invalid, though relating to an interest in land, but was sufficiently supported by the submission. *Murphy v. Bellew.* Page 250

BAIL.

- Staying proceedings against,
 See PRACTICE, (LAW), 2.
- Costs of recognizance of bail in error,
 See COSTS, 8.

BANKING COMPANY.

Where in an action, brought in 1839, against a public officer of a banking company, for overmarking a writ of execution in 1838, the plaintiff produced a certificate under the 6 Geo. IV. c. 42, of a return sworn 28th March, 1838, to prove that the defendant was the public officer of the company, and it appeared that no registry, as required by this Act, had been made of the officers of the company after 1838. *Held*, that this, coupled with the certificate, was evidence to go to the jury of the defendant being such public officer when the action was brought. *Durant v. Potter.* Page 253

BILL OF EXCHANGE.

Service of the protest is sufficient notice of the dishonor of a bill of exchange or promissory note. *Hamilton v. Smith.* Page 100

BILL OF LADING.

See CONTRACT.

BOGS.

1. Where A. had been in possession of the lands and bog of G., as devisee in fee, and on disputes arising concerning the will by which he claimed, conveyed the lands and bog to B., and took back a lease for lives renewable for ever, of the house and demesne of G., together with the liberty of commonage in the bog of G., "in as full, ample,

and beneficial a manner as the said demised premises had lately been enjoyed by him." *Held*, that such grant did not authorize any right of cutting turf for sale. *Massy v. Gubbins.* Page 88

2. A demise of bog and commonage, with lands, does not *per se* give the lessee a right to cut turf for sale. *Jack v. Creed,* Page 94

3. H. C. being seized of the lands of D., demised the same to A., his heirs and assigns, for a term of three lives with a covenant for renewal, "excepting to the said H. C., his heirs and assigns, all royalties, minerals, fuller's earth, &c., and bogs or turf mosses whatsoever; together with all woods, &c., with ingress, egress, and regress to dig for, fell, and carry away, all and every the before excepted premises; and liberty at all times for the said H. C., his heirs and assigns, to fowl, hunt, &c. upon the premises, saving always and reserving out of this exception to the lessees, their heirs and assigns, liberty to dig out and take lime, slate, or other stone and turf moss, to be spent and employed upon the premises." *Held*, that by the above exception, the subsoil of the bogs was reserved to the lessor; and that the tenant took only a right of turbary therein.

Boyle v. Olpherts. Page 320

BOND.

Judgment will not be allowed to be entered by virtue of a warrant of

attorney, authorizing an entry of judgment on a money-bond, where no bond has been executed, such a practice being a fraud upon the stamp acts. *Connor v. Connor*.

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BYE-GONE-RENTS.

See RECEIVER, 3, 4.

CERTIFICATE.

See BANKING COMPANY.

CHANGING VENUE.

See VENUE, 1, 2.

CHURCH TEMPORALITIES.

A. being tenant of lands held under the see of D., by lease of 7th April, 1826, demised to B. his executors, &c. certain premises for a term of 21 years, with a *toties quoties* covenant for renewal, and with a covenant on the part of B. against carrying on certain trades, &c. on the premises. A. having purchased the fee in the lands under the Church Temporalities Act, B. offered to pay his proportion of the purchase-money, and required a conveyance of the perpetuity. *Held*, that B. was not entitled to have a conveyance of the perpetuity, discharged from the prohibitory clauses contained in his lease. *Dockrell v. Dolan*. Page 283

CHARITABLE USE.

Where there is a bequest of money in trust for a charitable use, and the

trustee dies before the trust is executed, the disposition of the property belongs to the crown under the sign manual. *Phelan v. Russell*. P. 674

COMPOSITION.

See ACCOUNT, 1.

CONDITION.

A. made a lease by indenture, containing a covenant, that it was agreed and these presents were upon the condition that the lessee should not "alien, sell, mortgage, assign, dispose of, let, underlet or part with" the demised premises, or *permit the same to be occupied*, without the consent of the lessor; and if it should happen that the lessee should, in violation of the said covenant "alien, sell, mortgage, assign, grant, convey, dispose of, underlet or part with the premises, or any part thereof," the demise should cease, or the lessee pay an advanced rent. The lessee permitted part of the lands to be occupied by a stranger. In ejectment for the forfeiture, *Held*, that this was not a breach of the condition such as to avoid the lease. Lessee *Sharp v. Bergin*. Page 232
See GUARANTEE.

CONSIDERATION.

See ASSUMPSIT, 1, 3.

CONTRACT.

A., agent for B., who resided in *Tralee*, sold 1200 barrels of barley to W., residing in *Cork*, to be delivered

"free on board the D. then in *Tralee*, payment to be made on receipt of the bill of lading and invoice." On 9th Nov. the barley was delivered on board the D. and a bill of lading made out to the shipper's order, which was not forwarded. On the 12th Nov. the vessel and cargo were lost on the voyage to *Cork*, and before W. knew of the loss, A. produced the bill of lading to W. on the 16th Nov., and obtained £800 on account, without informing him of the loss of the barley. *Held*, that the property vested in the vendee by the delivery on board, and that the £800 could not be recovered in an action for money had, &c. (RICHARDS, B. *dissentiente*.) *Wise v. M'Mahon*. Page 192

See ASSUMPSIT, 2.

CONVEYANCE.

A. demised certain freehold lands, held by a lease of lives renewable, to C. and G., and directed in what proportions they should pay the head rent; C. suffered a judgment to be entered against him, and allowed an arrear of head rent and renewal fines to accrue in respect of his share, and then by a voluntary deed conveyed his share to G., who paid off the arrears of rent and fines, and entered into possession of C.'s share. On a bill filed by a judgment creditor, *Held*, that G. was not entitled to repudiate the conveyance as an absolute sale to him, and to claim as an incumbrancer against the estate

the amount of fines and rents, so paid by him; but that he was a purchaser thereof, and a sale was decreed against him. *Barker v. Roe*. Page 655

See FRAUDULENT CONVEYANCE.

VOLUNTARY CONVEYANCE, 1, 2.

COSTS.

1. Where the conduct of the landlord of a lease of lives renewable for ever has been oppressive and vexatious, he will be made to pay the costs of the suit for redemption, from after the filing of the bill. *Newenham v. Mahon*. Page 34
2. Malice is not necessary to sustain an application under the 43 Geo. III. c. 46, sect. 2, by a defendant for his costs. It is sufficient if a party be arrested, though he be not held to special bail. *Tuthill v. Bridgeman*. See 4, *post*, Page 132
3. Where the cause at nisi prius was referred, and the postea endorsed for the amount, this was held equivalent to a recovery by verdict. *Ibid*.
4. An application under 43 Geo. III. c. 46, for overmarking a writ cannot be sustained, unless an actual arrest has taken place; a mere holding to bail is not of itself sufficient. *Cash v. Trevor*. Page 171
5. On application by a plaintiff for liberty to issue execution under 3 and 4 Vict. c. 105, upon a rule of Court directing payment of costs taxed and certified, the order was made that the defendant should pay the sum certified, which order was

- to be registered, and execution to issue thereon. *Tuthill v. Bridgeman*. Page 223
6. The costs of a prosecution of a process-server for perjury will not be allowed to a defendant who has taken the affidavit of such process-server off the file, for the purpose of such prosecution, though the process-server has been convicted. *Lewis v. Hynes*. Page 229
7. Where trespass was brought by a tenant of A., to try a right of way over A.'s property, and A. had written to the defendant's attorney, disclaiming his own interest in the suit, but admitting that he would pay the expenses of the plaintiff (who was a pauper,) in order to enable him to contest the point: the Court stayed the proceedings until A. should give security for costs. *Egan v. Kirkaldy*. Page 247
8. Where a defendant had lodged a writ of error, and served notice of entering into recognizance before a judge of assize, but did not attend to do so, the plaintiff who attended to oppose the notice cannot obtain on motion the costs of such ineffectual notice. *Middleton v. Sadleir*. Page 365
9. In a creditor's suit the heir at law of the debtor, who has been decreed his costs out of the surplus fund, cannot have them against the plaintiff, if the fund prove insufficient. *Hunt v. Bateman*. Page 379
10. Where a plaintiff sought the benefit of a former decree against a purchaser with notice of the plaintiff's equity from the former defendant, and the conduct of the defendant had been evasive and improper, the plaintiff was declared entitled to have his costs against such purchaser the present defendant. *Patten v. Wallace*. Page 470
11. Where an action had been commenced by an administratrix in respect of the amount of several bills of exchange which appeared by the intestate's books to have been due to him by the defendant, and it appeared that there had been several dealings between the defendant and intestate, and that within six months before the intestate's death he had been heard to say that the defendant was considerably indebted to him, and that the plaintiff believed, up to the time of the trial, that the defendant was so indebted, and that offers of arbitration and settlement had been made before the trial to the defendant, who had admitted that something was due to the intestate, and said that he would shortly make a payment on account to the agent of the plaintiff, but after action brought, stated, that he was not indebted to the plaintiff, but refused to state the amount of the credits: it also appeared, by the report of the judge, that the case was one of complicated accounts in which the evidence principally consisted of documents shown for the first time at the trial: On an application to disallow the defendant his costs

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under 3 & 4 Vict. c. 105, sec. 66,
the Court refused the application.
Martin, administratrix of *Martin*,
v. *Johnston*. Page 633

COVENANT.

Where A., by marriage articles under
seal, covenanted that certain sums
should be vested in trustees, upon
trust to pay the interest to A. for
life, and after his death to pay the
principal to his wife and children,
and A. got part of the money into
his hands, and applied it to his own
use, the trustees may recover the
amount against the assets of A., in
a creditor's suit. *Jamieson v. Far-*
ran. Page 164

See CHURCH TEMPORALITIES.

PLEADING, 11.

CRIER.

See OFFICER.

CUMULATIVE LEGACIES.

See WILL, 1.

DAMAGES.

1. In trespass by an apprentice against
his master for assault and battery,
the defendant pleaded not guilty;
the defendant cannot at the trial
give in mitigation of damages evi-
dence of an admission by the plain-
tiff that his master had beaten him
for misconduct. *Pujolas v. Holland*.
Page 177
2. In the entry of a judgment, "da-
mages" include costs. *O'Loghlen*
v. *Fogarty*. Page 516

DECREE.

In an undefended case the proofs shall
be entered as read; and the plaintiff
shall take such decree as he shall
abide by. *Raymond v. Evans*.
Page 582

DELIVERY.

See CONTRACT.

DEMURRER.

See PLEADING, 4, 5, 6, 7, 9, 10.

DISCHARGE FROM CUSTODY.

See PRACTICE, (LAW) 1, 5.

DUPLICITY.

See PLEADING, 7.

EJECTMENT.

1. The Court will not allow service of
an ejectment *nunc pro tunc*, on the
provisional assignee of insolvent
debtors, when service was not made
until the first day of the term in
which the ejectment is sought to be
moved on, though such assignee is
only made a party pro formâ. Lessee
Voidal v. Ejector. Page 107
2. The attorney for the lessor of a
plaintiff in ejectment will be allowed
his costs of searches made by him
against both names and lands, for
the purposes of the cause, also for
his docket of instructions to the
registrar. Lessee *Duc de Castries*
v. *Lawlor*. Page 224
3. In ejectment on the title the plain-
tiff proved service on the defendant
of a notice to quit on 1st May fol-
lowing, and that the notice at service

had been explained to the defendant, who did not then object to the notice, but said he had a longer term. The gale days were proved to be in November and May; but there was conflicting evidence as to the time when the tenancy commenced. *Held*, that the tenant was not thereby estopped from setting up as a defence that the tenancy commenced in November. *Doe d. Ashe v. Lehane*.

Page 259

4. A tenant who has stated to his landlord that his tenancy has commenced in March, shall not be permitted at a trial in ejectment to set up that it commenced in November. Lessee *Frewen v. Aherne*. Page 264
5. An interest acquired after the service of an ejectment does not entitle a party to take defence. Lessee *McKiernan v. Shenkin*. Page 282
6. In ejectment cases in this Court judgment, as in cases of nonsuit, cannot be had until three terms have elapsed after the second declaration filed, issue not being joined until then. Lessee *Dempsey v. Nolan*. Page 499
7. A., in 1811, demised eight and a-half acres of the lands of B. to R. and accepted a surrender of one acre of these lands and executed a new lease of the one acre to R. in 1822, by an indenture which did not mention any sum to be reserved as the rent of the acre so demised. *Held*, that the lessor's right of re-entry under the ejectment statutes was gone by the severance of the

reversion. Lessee *Denny v. O'Connell*. Page 629

See JUDGMENT, 11.

ESTOPPEL,

By parol declaration of a tenant on service of notice to quit,

See EJECTMENT, 3, 4.

EVIDENCE.

1. The handwriting of a party to a bill of exchange cannot be proved, *viva voce*, at the hearing of a cause. *O'Hara v. Creagh*. Page 65
See WITNESS, 1, 2, 3.
2. In trespass by an apprentice against his master for an assault and battery, to which the defendant has pleaded not guilty; the defendant cannot, at the trial, give in mitigation of damages, evidence of an admission by the plaintiff that his master had beaten him for misconduct. *Pujolas v. Holland*. Page 177
3. A witness who had sworn written depositions on a former occasion, in which he afterwards made some alterations, cannot be cross examined as to those alterations, without producing the depositions. *Ibid*.
4. A verdict in a civil action cannot be given in evidence by the mere production of the postea; for *non constat* that it has been followed by a judgment. *Gillespie v. Cumming*. Page 181
5. *Semble*, it is otherwise in a criminal case. *Ibid*.
6. An entry of the issuing of a civil bill decree in the book kept by the

clerk of the peace at quarter-sessions, is not primary evidence of such decree, such entry not containing the addition of the defendant or the signature of the assistant barrister.

Alcorn v. Larkin. Page 666

7. A notice served at twelve o'clock the day previous to a trial at nisi prius in Dublin, to produce a document in evidence is too late. *Ibid.*

EXCEPTION.

See *Bogs*, 3

EXECUTOR.

See *ACCOUNT*, 3.

COSTS, 11.

FISHERY.

Where the plaintiff was seized in fee of a several fishery in a part of the river B. not navigable, and the defendant constructed weirs of timber in a part of the same river below the plaintiff's fishery where the tide ebbed and flowed. *Held*, that such weirs were illegal under the 10 Car. I. sess. 3, c. 14, *Irish*; and *Held*, that in an action for an injury to the plaintiff's fishery, though the plaintiff had stated the weirs to be wrongfully and injuriously erected; but had not alleged the erections to be a nuisance, where it appeared from the evidence that the erections were a nuisance in a navigable river, the defendant cannot take advantage of his right respecting them as he otherwise might have done. *Freuen v. Orr.* Page 601

FORFEITURE.

See *CONDITION*.

FRAUDULENT CONVEYANCE.

A. made two conveyances of land for voluntary consideration, and the grantee of the second conveyance assigned the land to B. for value; B. shall avoid the former conveyance under the 10 Car. I. c. 3, *Irish*. Lessee of *Moffett v. Whittaker.*

Page 141

GUARANTEE.

Assumpsit on a guarantee "that in consideration that the plaintiff would give credit to E. P. to the amount of £400, the defendant undertook to guarantee. Averment, that the plaintiff gave credit to E. P. to the amount of £300. *Held*, on special demurrer, that the giving credit to the full extent of £400 was not to be construed as a condition precedent. *Lindsay v. Parkinson.* Page 590

See *PLEADING*, 5.

HOUSEKEEPER.

See *OFFICER*.

INJUNCTION.

This Court deals with its tenants as tenants at will; and therefore where a tenant had been let into possession under the Court for a term of seven years, or pending the cause, the Court will not grant an injunction to dispossess him, without an affidavit as to the state of his crops. *O'Connell v. O'Callaghan.* Page 157

INSURANCE.

A. having promised B., his clerk, to increase his weekly salary, if B. would insure his own life and assign the policy to A.; B. did so, and without consideration, assigned the policy to A., who shortly after dismissed B. from his service on unfounded pretences. On a bill filed by the representatives of B., the assignment was declared void, and the amount of the policy (deducting the premiums which were proved to have been paid by A.) was decreed to be handed over to the plaintiffs, and the defendant was made to pay costs. *Scott v. Roose.* Page 54

INTERROGATORIES.

A motion to suppress interrogatories as leading should be made as soon as possible after publication; and therefore such a motion was refused, where on a previous motion to suppress interrogatories in the cause, the Court had permitted the plaintiffs to reswear the same witnesses to the same interrogatories. *O'Hara v. Creagh.* Page 65

INQUIRY.

An inquiry will not be directed as to the circumstances of the settlor of a voluntary settlement at the time of its execution unless it appear to the Court that he was indebted at the time to a substantial amount. *Manders v. Manders.* Page 491

IRREGULARITY.

See PRACTICE, 5.

JUDGMENT.

1. Judgment may be entered *nunc pro tunc*, when the giving judgment has been delayed by the Court itself (as by the pendency of a new trial motion) and the defendant in the meanwhile dies: saving the rights of intermediate creditors. *Hosier v. Powell.* Page 2
2. The grounds upon which a foreign judgment has been pronounced are not to be examined into here in an action of debt upon that judgment; unless it appears to be contrary to natural justice, or to the law of the country where it was pronounced. *Semble, Sims v. Thomas.* Page 19
3. Where a judgment was confessed and the conuzor became insolvent, admission by the insolvent in his schedule in 1818 and of his assignee in their answer to a bill filed in 1826 to raise the debt, of the existence of the judgment, are sufficient grounds for a *scire facias* to revive it. *Neligan v. Gunn.* Page 110
4. Where a bill of exchange was drawn by A. on B. and accepted by him, and indorsed by A. to C. and by C. to W., and W. had sued B., and then finding the judgment of no avail against him, had afterwards sued C.; the Court refused to allow judgment as in case of non-suit to be entered against W. it having become unnecessary for him

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- to proceed in the action. *White v. Doolan*. Page 315
5. A warrant of attorney to the obligee of a bond to enter judgment thereon, does not authorise the entry of a judgment at the suit of his executor. *Robinson v. Campbell*. Page 192
6. A warrant of attorney may be taken off the file to enter judgment on it in *England*, the plaintiff vacating it here. *Wall v. Lightman*. Page 227
7. In assumpsit for work and labour the defendant pleaded non assumpsit as to part and a tender as to part: judgment was marked on the whole record for want of a replication. *Held*, that it was wrongly entered, and should have been only for the amount of the sum tendered. *Cummins v. Creagh*. Page 280
8. The Court will not permit judgment to be entered upon a warrant of attorney to enter judgment on a money bond, when no bond has in fact been executed. *Connor v. Connor*. Page 337
9. A scire facias issued to revive a judgment in *Trinity* term 1840, and a rule for judgment thereon was regularly entered, which expired in November, 1840. It was lately discovered that no judgment was entered thereon. The Court, in *Hilary* term, 1842, granted a conditional order to mark judgment. *Jackson v. Gering*. Page 442
10. The Court has an equitable jurisdiction to set aside satisfaction of a judgment entered by virtue of a warrant of attorney obtained improperly, or from a party ignorant of his rights. *Nuttall v. Nuttall*. Page 482
11. In ejectment cases, in the Court of Exchequer, judgment, as in case of nonsuit, cannot be had until three terms have elapsed after the filing of the second declaration, issue not being joined till then. Lessee *Dempsey v. Nolan*. Page 499
12. The Court will inquire into the day on which judgment was really entered to prevent its operating injuriously. *O'Loughlin v. Fogarty*. Page 516
13. *Semble*, The assignee of a judgment may sue out execution upon it in his own name, when it has been revived, and assigned since the revival, the execution reciting that special matter. *Fitzgerald v. Dalton*. Page 662
- See REDOCKETING, 1.
- LEGACY.
- See WILL.
- LIMITATIONS, STATUTE OF.
- See ADVERSE POSSESSION, 1.
1. The 3 & 4 Wm. IV. c. 27, sect. 40, applies as well to personal as to real estate. *O'Hara v. Creagh*. Page 65
2. When letters or conversations are relied on as taking a case out of the statute, they should be stated in the bill. *Ibid.*
3. An affidavit by the respondent in a petition matter for the appointment of a receiver on a judgment, denying that the entire sum claimed by

the petitioner was due, but stating that £474 8s. was the entire sum due on the judgment, is a sufficient acknowledgment in writing of the debt to take the case out of the statute of limitations. *Tristram v. Harte*. Page 186

4. Judgment was obtained by V. on a joint bond and warrant of attorney against A. and B. in 1815; B. had joined in these as a security for A. On 16th March, 1820, A. wrote to V's agent "you have enclosed £150 to my credit on account of V's interest;" and in the account book kept by V's agent (since dead) appeared an entry by the agent of V., March 1820, charging himself with a bill for £50, drawn by A., and £100 cash from A. In 1822, V's attorney applied by letter to B., calling for payment of the amount of the above debt; and B., on that occasion, wrote to V's attorney, acknowledging the receipt of his letter "applying for payment of his (B.'s) and A.'s joint bond," and soon after B.'s agent wrote a letter to V.'s attorney, enclosing a proposal of terms upon which the matter should be arranged by A., and said "this being done, it is hoped the judgment against B. will be satisfied." The bill was filed in 1839. *Held*, that this was a sufficient payment and acknowledgment to take the case out of the 3 & 4 Wm. IV. c. 27. *Vincent v. Willington*. Page 456

5. Quere, does 3 & 4 Wm. IV. c. 27, repeal the 8 Geo. I. c. 4, *Irish*? *Ib*.

6. Where the plaintiff, an attorney, had applied for payment of a bill of costs, not taxed, some of the items of which were admitted by the plaintiff in his application to be barred, by the statute of limitations, others not, and the defendant had written in reply, "Mr. P. will attend to tax your costs, which will be best for both parties, as the one will know what he is to give, and the other what he is to receive." *Held*, that this was a sufficient acknowledgment in writing to take the case out of the statute of limitations, 3 & 4 Wm. IV. c. 27. *Murphy v. Meredith*. Page 542

7. Where a judgment had been entered in 1807, and no action, suit, or other proceeding within the meaning of the 8 Geo. I. c. 4, *Irish*, had been taken upon it for more than 20 years, such judgment is barred, notwithstanding an acknowledgment in writing of the debt had been given in the year 1827. *Morrrough v. Power*. Page 644

8. *Semble*, an acknowledgment of a debt in the schedule of an insolvent is a sufficient acknowledgment in writing under 3 & 4 Wm. IV. c. 27, sec. 40. *Ibid*.

9. Where a party had originally come into possession of land by permission of A., and had acknowledged A.'s title in 1804 and 1811, but had never paid any rent in respect of the land, and had given no acknowledgment of A.'s title for more than 20 years from 1811. *Held*, that

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an ejectment by the representative of A. was barred after the 20th year. Lessee *Ellis v. Crawford*.

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LODGMET OF MONEY IN COURT.

1. Where a defendant after appearance, and before declaration filed, lodged a sum of money "in full for debt and costs hitherto," and the plaintiff wished to draw the money, but feared to do so, lest his doing so should operate as a discontinuance of the action; and afterwards filed a declaration, and applied to vacate the rule for lodgment, and that the money should be lodged under the 34th General Rule.—*Held*, that the lodgment in this way, being before declaration filed, was regular. *Mallett v. Doolin*.

Page 367

See PRACTICE (LAW) 6.

MONEY COUNTS.

See ASSUMPSIT, 2.

NEW TRIAL.

1. Where a notice of trial has been duly served, and no defence is made, owing to want of preparation, and judgment is given for the plaintiff, the defendant will not be allowed to set aside the verdict, though the want of preparation was owing to the mistake of his attorney. *Baron v. Connelly*. Page 151
2. *Semb.* There is no difference between English and Irish practice,

as to granting a new trial in an undefended case. *Ibid.*

3. A motion to reduce a verdict, pursuant to leave reserved at the trial, is of the nature of a new trial motion, and notice of such motion must be served within the first six days of term. *Taylor v. White*.

Page 504

NOTICE.

Service of a protest is sufficient notice to the indorser of the dishonour of a promissory note. *Hamilton v. Smith*.

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See ATTORNEY, 1.

COSTS, 8.

NOTICE OF A TRUST.

See PURCHASER.

NOTICE TO ELECT AN ATTORNEY.

See ATTORNEY, 1.

NOTICE TO QUIT.

In ejectment on the title against an overholding tenant, the plaintiff proved service on the defendant of a notice to quit on the 1st of May following, and that the notice, at the time of service, had been explained to the defendant, who did not then object to the notice, but said "he had a longer term." The gale-days were proved to be in November and May; but there was conflicting evidence as to the time when the tenancy commenced.—*Held*, that the tenant was not there-

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by estopped from setting up as a defence, that the tenancy commenced in November. Lessee *Ashe v. Lehane*. Page 259

NUL TIEL RECORD.

General rule, that an abstract of the pleadings shall be furnished to the Court. Page 524

See VARIANCE, 1, 2.

PLEADING, 8.

NUISANCE.

See FISHERY.

OFFICER.

The Court will not, on motion, refuse to allow the usual fees payable on the swearing-in of attorneys to the secondary, the tipstaff, and deputy crier. *In re Ince*. Page 584

PAYMENT OF MONEY INTO COURT.

See LODGMENT.

PLEADING.

1. Although a lease under a power to lease for three lives, or thirty-one years, may operate as an appointment, it is sufficient in pleading to state it as a lease. *Hosier v. Powell*. Page 2
2. (In Equity.)—Where letters or conversations are relied on as taking a case out of the statute of limitations, they should be stated in the bill. *O'Hara v. Creagh*. Page 65
3. The Court will not extend the time to plead for the purpose of enabling

the defendant to plead a dilatory plea. *Bond v. Bell*. Page 226

4. Where a declaration in *indebit assump.* alleged the defendant to be indebted to the plaintiff in £20, for the use and occupation of an apartment, and (without laying any promise to pay it) proceeded to state him to be indebted to the plaintiff in several other sums for goods sold, &c. concluding with an averment that the defendant had promised, in consideration, &c. to pay "*the said last mentioned* several monies respectively, on request," but had not paid "the said monies, or any part thereof," to the damage, &c. *Held* bad on demurrer, for want of a promise in the first count, which was not referred to by the words "last-mentioned" in the second count. *Wilson v. Mitchell*. Page 275
5. The *Hibernian Gas Company* having supplied gas to an hotel, of which M. & L. were proprietors, for the price of which gas M. & L. were indebted to the Gas Company, the defendant, who was the receiver of the profits of the hotel for M. & L., gave an undertaking to the Gas Company, as such receiver, and with the sanction of M. & L., that the sum so due should be paid within six months from the date thereof, and also undertook that the future supply of gas to the above concern should be discharged by him, (the defendant,) as it should become due, until further notice. *Held*, on demurrer, that a sufficient

- consideration of forbearance to sue appeared on the face of this undertaking, to entitle the Gas Company to maintain assumpsit. *Hibernian Gas Company v. Parry*. Page 344
6. In debt for double rent, under 15 Geo. II., c. 8, the declaration must allege the notice by the tenant of his intention to quit the premises, to have been given in writing. *Farrell v. Donnelly*. Page 374
7. Where a declaration in assumpsit by the indorsee against the maker of a promissory note, contained a count alleging a promise to pay "according to the tenor and effect" of the note, and the consolidated money counts; and the general conclusion alleged a promise to pay "the said several monies to the plaintiff respectively, on request:" *Held*, on demurrer, that the promise was well enough laid, though the words "*last mentioned*" were omitted in the general conclusion. *Sonder v. Darcy*. Page 512
8. An objection that the pleading is bad in substance may be taken upon a plea of *nul tiel record*. *O'Loughlin v. Fogarty*. Page 516
9. It is not ground of general demurrer in an action against bail that the replication has omitted to state that the county into which a *ca. sa.* had issued, was the county in which the venue in the original action had been laid. *Ibid.*
10. In debt for tithe rent-charge, it is not sufficient to plead non-payment of tithe for 30 years before the composition under 4 Geo. IV. c. 99, without alleging that the lands were exempt from payment of tithe; such plea is bad on general demurrer. *Earl of Shannon v. Dowden*. Page 529
11. Where a defendant was sued on a bond conditioned for the performance, by a third person, of covenants, (some of which were negative,) and pleaded generally, performance of the covenants, and the plaintiff demurred to such plea, the Court permitted the defendant to amend his plea, and plead specially performance of the negative covenants. *Johnson v. O'Hagan*. Page 597
12. Plea of privilege,
See PRIVILEGE, 1.
13. Amendment of Pleadings,
See AMENDMENT.
14. Plea of *nul tiel record*,
See VARIANCE.
- POLICY OF INSURANCE.
See INSURANCE.
- POWER.
1. A power to lease for three lives or thirty-one years, authorizes a lease for three lives *and* thirty-one years concurrent. *Hosier v. Powell*. Page 2
2. Although a lease under such a power operates as an appointment, it is sufficient, in pleading, to state it as a lease. *Ibid.*

POWER OF ATTORNEY.

1. A power of attorney to receive rents and to serve notices to quit, requires two separate stamps. Lessee *Sir R. Gore Booth v. M'Gowan*. Page 273

PRACTICE (LAW,)

1. A defendant who has obtained an order under 3 & 4 Vict. c. 105, for his discharge on entering a common appearance, will not be discharged until he enters the appearance and the plaintiff may declare against him as in custody. *Dolan v. Walpole*. Page 17
2. Where a defendant gave bail to a writ, but did not give bail to the action, and the plaintiff took an assignment of the bail bond from the sheriff, and proceeded against the bail by a writ returnable since the 1st Nov. 1840, proceedings on the bail bond were stayed, and the bail bond was delivered up to be cancelled, under 3 & 4 Vic. c. 105. *Ferrier and others v. Purcell*. Page 105
3. A conditional order must rely on the affidavits to support it and those filed as cause against it; therefore the defendant on a motion for judgment, as in case of a nonsuit, cannot rely on answering affidavits to those filed as cause. *White v. Doolan*. Page 135
4. Where a defendant, after appearance entered and before declaration filed, lodged a sum of money "in full for debt and costs hitherto," and

the plaintiff wished to draw the money, but feared to do so, lest his doing so should operate as a discontinuance of the action, and afterwards filed a declaration, and applied to vacate the rule for lodgment, and that the money should be lodged under the 34th general rule. *Held*, that the lodgment in this way having been before declaration filed, was regular. *Mallett v. Doolin*. Page 367

5. A defendant had been arrested on a writ of ca. sa. on 2nd December, 1841, which had not been indorsed with the place of abode and addition of the defendant. The defendant swore that he did not know of the irregularity until 8th March last, when all the Barons were out of town on circuit, and that notice of this application had been given on the return to town of the Chief Baron. *Held*, that this was not such laches as precluded the defendant from applying after a term and vacation, to have the writ set aside and the defendant discharged. Administratrix of *Martin v. Gregg*. 594
- Per. LEFROY, B.* In future notice of irregularity in such case, will be held to attack at the time of arrest. *Ib.*
6. Where a copy of a writ had been served on a defendant in an action of *indebitatus assumpsit* for the price of goods sold, &c. but there was no indorsement upon the writ in pur-

suance of the 52nd general rule, and the defendant had appeared, and a declaration was filed, and a bill of particulars delivered in the present term, the defendant was allowed to lodge in Court as of a time previous to the declaration, the sum which he acknowledged to be due to the plaintiff; and the plaintiff's attorney was ordered to pay the costs pursuant to the rule. It does not disentitle the defendant to such costs that he has given notice in the alternative, to set aside the writ or the copy of the writ. Assignee of *Cluff v. Quin*. Page 625

7. It is too late to object to the notice of a motion grounded on "an affidavit filed," when the date of the notice is prior to the date of the affidavit, if the party objecting has already answered the affidavit. *Cooper v. Kirby*. Page 677

8. Substitution of service.

See PROCESS, 1, 2, 3, 4, 6.

JUDGMENT, 13.

PRACTICE (EQUITY.)

1. The affidavit of a defendant against whom process of sequestration has issued, will not be heard as cause against a conditional order obtained in the cause, such affidavit not stating any irregularity in the proceedings. *Creed v. Creed*.

Page 581

2. In an undefended case the proofs shall be entered as read, and the plaintiff shall take such decree as

he shall abide by. *Raymond v. Evans*. Page 582

See RECEIVER, 6.

PROCESS, 1, 6.

PRISONER.

A defendant who has obtained an order under the 3 & 4 Vic. c. 105, for his discharge from custody on entering a common appearance, will not be discharged until he enters the appearance, and the plaintiff may declare against him as in custody. *Dolan v. Walpole*. Page

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PRIVELEGE.

1. Assumpsit against an examiner of the Court of Chancery, who pleaded his privilege as such to be sued in Chancery, and verified his plea by an affidavit "that the within plea is true in substance and in fact, to the best of this deponent's judgment and belief." *Held*, 1st. that such plea must be verified by affidavit. 2nd. that this affidavit was not sufficiently precise, as it did not state that the deponent was still exercising or ready to exercise the duties of his office. *Lery v. Fenton*. Page 598

See WITNESS, 3.

ATTORNEY, 2, 3.

PROCESS.

1. Service of process under 4 & 5 Wm. IV. c. 82, allowed, where the defendant was not personally known to the process-server, such service

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- having taken place in America.
Administratrix of Atkinson v. Watson. Page 108
2. The Court will not allow substitution of service on A., the defendant's law agent, when the proof alleged of A. being such agent is the entry of an appearance two terms ago for the defendant by A.
Wallis v. Austin. Page 138
3. The Court will not allow substitution of service on A., the defendant's law agent, when the only evidence of A., being such agent is, the bringing of two actions by A., as his attorney, in this Court, two years since, and the taking defence to a sessions ejectment for him three months before. *Fitzgerald v. Low.* Page 140
4. In a petition under 1 & 2 Vic. c. 109, service of a conditional order allowed on rate payers when the tithe payers could not be discovered
Knox v. Marlay. Page 159
5. The time when "process is returnable" in the 27th general rule means the return of the writ, not that of the appearance of the defendant. *Lewis & Pringle v. Meehan* Page 155
6. On an application under 4 & 5 Wm. IV. c. 82, the Court will not substitute service of subpœna to answer upon a person who has been appointed receiver, over the defendant's lands, in a cause in Chancery, unless it be sworn that he remits the rents to the defendant.
Butler v. Goold. Page 270

PROMISSORY NOTE.

Service of the protest is sufficient notice to the indorser of the dishonour of a promissory note. *Hamilton v. Smith.* Page 100

PROVISO.

See CONDITION.

PURCHASER,

With notice of a trust. See *Påtten v. Wallace.* Page 470

RECEIVER.

1. The first duty of a receiver is to pay the head rent, if properly demanded. *Evans v. Norcott.* P. 380
2. On application, on behalf of a landlord, for liberty to eject for his rent, which a receiver over the premises had refused to pay, the Court ordered that the landlord should be at liberty to eject if the receiver did not pay the demand on or before the 1st January next. The costs of this motion to be paid by the receiver, if he should pay the rent without prejudice to his being disallowed them if this motion were made necessary by his misconduct. *Ibid.*
3. A judgment creditor who has obtained a conditional order to extend a receiver in another matter to his demand, which order is afterwards made absolute, though prior to the creditor in whose matter the receiver had been first appointed, is not entitled to the arrears of rent due at the date of the order extending the receiver, and subsequently received

by the receiver. *Coleman v. Mason.*

Page 545

4. In such a case the right of the creditor who extends the receiver attaches at the date of the *conditional* order for appointing him. *Ibid.*
5. On application, by a judgment creditor, for a receiver, the Court will not consider the year limited by 3 & 4 Vict. c. 105, sec. 22, to have elapsed unless it has elapsed before the date of the *conditional* order for appointing the receiver. *M'Dermott v. Moylan.* Page 555
6. A receiver will not be appointed in the Court of Exchequer after a final decree. *Barker v. Roe.* Page 555

REDEMPTION.

Where a tenant holds two denominations of land from the same lessor, by separate leases, and devises one of them to A., and both are evicted for non-payment of rent, A. may redeem the part devised to him without redeeming the other part. *Newenham v. Mahon.* Page 34

When the conduct of the landlord has been oppressive and vexatious, he will be made to pay the costs of the suit for redemption from after the filing of the bill. *Ibid.*

REDOCKETTING OF JUDGMENTS.

Where a creditor, by judgment of 1793, devised his lands in trust, charged with the payment of his debts, and the lands were subsequently purchased from the devisees

beneficially entitled, subject to the incumbrances affecting them, and the judgment had not been revived or redocketted within five years after the passing of the redocketting act. *Held*, that the trust for payment of debts prevented the judgment from being barred under the redocketting act. *Cockburn v. Warner.* P. 443

RE-ENTRY.

See EJECTMENT.

REGISTRY.

Costs of searches in the registry office.

See EJECTMENT, 2.

REHEARING.

1. Where counsel has relied at the hearing of a cause upon only some of several grounds of defence, such selection does not amount to a waiver of the rest; and where such had been the case, and an appeal was made to the house of lords, a petition was allowed to be presented for a rehearing to amend the notes of the decree, by inserting evidence to meet the rest of the defence, without obliging the appellant to withdraw his appeal. *Galwey v. Barrow.* Page 76

RETURN OF A WRIT.

See VARIANCE, 2.

SATISFACTION.

See JUDGMENT, 10.

SCIRE FACIAS.

See JUDGMENT, 3, 9.

SECONDARY.

The Court will not on motion refuse to allow the usual fees payable on the swearing in of attornies to the secondary, tipstaff, and deputy crier. *In re Ince.* Page 584

SECURITY FOR COSTS.

See COSTS, 7.

SEQUESTRATION.

See ACCOUNT, 2, 3.

In Equity.

See PRACTICE, (EQUITY.) 1, 2.

SEQUESTRATOR.

See ACCOUNT, 2, 3.

SERVICE OF PROCESS, SUBSTITUTING,

See PROCESS, 1, 2, 3, 4, 6.

SHERIFF.

1. His authority continues for some purpose after the appointment of his successor in office. *Lord Ash-ton v. Burke.* Page 338
2. A sheriff having seized goods under a *fi. fa.* suffered them to remain on the premises of the defendant in the execution: the new sheriff was appointed, and a list of prisoners and writs, directed by 5 & 6 Wm. IV. c. 55, was handed to him, in which the *fi. fa.* was not included. The incoming sheriff having no notice of the *fi. fa.* seized the goods of the defendant in the execution, under another writ. The outgoing sheriff brought trespass *de bonis*

asportatis for the seizure. *Held,* that such action was well brought. *Ibid.*

3. A sheriff having levied, by a sale by auction, the amount of an execution, the sub-sheriff retained out of the produce of the sale a sum for the auctioneer's fees, which sum he did not pay over to the auctioneer, but retained in his own pocket. The sale took place on 23rd May, 1841. Court did not consider the plaintiff guilty of laches in not applying before June, 1842, to have this money paid over, and under the circumstances, ordered it to be paid within a month. *Hayden v. Barton.* Page 682
4. This Court has jurisdiction to make sheriffs refund fees illegally exacted. *Ibid.*

SPECIALTY.

When A. executed marriage articles under seal, and it was thereby covenanted by and between the parties thereto that certain sums should be vested in trustees upon trust to pay the interest to A. for life, and after his death to pay the principle to his wife and children; and A. got part of the money into his own hands and applied it to his own use, the trustees may claim, in a creditor's suit, the amount against the assets of A. as specialty creditors. *Jamieson v. Farran.* Page 164

STAMP.

See POWER OF ATTORNEY.
ATTORNEY, 7.

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SUBPŒNA.

Substitution of service of.
See PROCESS, 6.

SUBSTITUTION OF SERVICE.

See PROCESS, 1, 2, 3, 4, 6.

TENANT.

An authority to receive rent and evict certain persons is not a general authority to determine tenancies.

Lessee *Frewen v. Aherne*. P. 264

See EJECTMENT, 3, 4.

INJUNCTION.

TIPSTAFF.

See OFFICER.

TITHE.

See PLEADING, 10.
PROCESS, 4.

TURF MOSS.

See Bog, 1.

TRUSTEE.

1. Conveyance by trustees, when to be presumed. See *Hosier v. Powell*.
Page 2

2. S. being a trustee of leasehold and stock, appointed by will A. and B. his executors, and died. A. and B. obtained probate to S. but never acted in relation to the trusts, on their refusal to do so, the Court appointed new trustees, under 1 W. IV. c. 60, sec. 22, the executors of S. undertaking to replace the amount of a breach of trust committed by S. upon the trust fund.

Muley v. Smith.

Page 241

TURBARY.

See Bog, 3.

VARIANCE.

1. In debt on a bail piece against bail, the declaration stated a judgment recovered by the plaintiff against the principal on the 17th June, 1840, of £81 16 1 "for his damages which &c. as well as on occasion of not performing certain promises, &c. by the principal as for his expenses and costs." Plea *nul tiel record*. The entry of the judgment was of the 27th May, 1840, and there was a marginal memorandum in the roll opposite the entry, "17th June, 1840." The entry was of three several sums, for damages, costs, and costs of increase. *Held*, to be no variance, the allegation of the judgment not being matter of description. *O'Loughlin v. Fogarty*. Page 516

2. The defendant in debt on a bail-piece against bail pleaded, no *ca. sa.* issued against the principal, and the plaintiff replied a *ca. sa.* issued, and a return "that he was not found." The return itself was "not to be found." *Held*, no variance; being of the same import. *Ib.*

VENUE.

1. In an action on a bill of exchange the court, though it will not change the venue on the ordinary affidavit will do so on special grounds. The

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proper time to apply is after plea pleaded and issue joined. *O'Callaghan v. Sullivan.* Page 1

2. Where in an affidavit to change the venue it was stated that the cause of action did not arise in the county of D. or elsewhere in Ireland, out of the county of G., and it appeared that, the cause of action was a contract made in Ireland, for the sale of goods in Sheffield, with the travelling agent of the defendant, the court refused to change the venue, *Reeves v. Kilbee.* Page 278

VERDICT.

See EVIDENCE, 2.

NEW TRIAL, 1, 2, 3.

VOLUNTARY CONVEYANCE.

1. Where A., made two conveyances of lands for voluntary consideration, and the grantee of the second conveyance assigned to B., for value, B. shall avoid the former conveyance under the 10 Car. 1, c. 3, *Irish.* Lessee of *Moffett v. Whittaker.* Page 141
2. A., in 1824, had executed on the same day, a mortgage for £2,000 of certain lands and a voluntary settlement of the same lands, and had become insolvent in 1829. A bill was filed in 1839, for a foreclosure of the mortgage, which prayed an account and sale, and that the surplus proceeds should be invested in the funds upon the trusts of the settlement. The assignee of the mortgagor filed a

cross bill to have the voluntary settlement set aside as fraudulent. It appeared that the mortgagor had been indebted at the time of the execution of the settlement to the amount of £87. The court would not under such circumstances direct an inquiry as to the amount of the debts of the settlor at the time of the execution of the settlement, and the cross bill was dismissed with costs. *Manders v. Manders.* Page 491

3. A voluntary settlement will be supported, unless the party making it is substantially indebted almost to the amount of insolvency. Per *Lefroy, B.,* *Id.*

WAIVER.

1. Where counsel, at the hearing of a cause has relied only upon some of the alleged grounds of defence, that is not necessarily a waiver of the other grounds. *Galwey v. Barrow.* Page 76

WARRANT OF ATTORNEY.

- A warrant of attorney allowed to be taken off the file to enter judgment on it in England: the plaintiff vacating the judgment here. *Wall v. Lightman.* Page 27
- The court has an equitable jurisdiction to set aside satisfaction of a judgment entered by virtue of a warrant of attorney, obtained improperly, or from a party ignorant of his rights. *Nuttall v. Nuttall.* Page 482
- See JUDGMENT, 5, 6, 8, 10.











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